PB83-204834

Annual Environmental Review Conference (6th) Held at Atlanta, Georgia on October 21-22, 1983

(U.S.) Environmental Protection Agency
Atlanta, GA

Mar 83

U.S. Department of Commerce
National Technical Information Service
NTIS

50272-101

REPORT DOCUMENTATION PAGE	1. REPORT NO. EPA 904/9-83-110	2.	3. Recipient's Accession No. PB83-204834

4. Title and Subtitle
Sixth Annual Enviornmental Review Conference October 21-22, 1983

5. Report Date
March 1983

6.

7. Author(s)
Environmental Review Branch, US EPA

8. Performing Organization Rept. No.

9. Performing Organization Name and Address
U.S. EPA Environmental Assessment Branch
345 Courtland Street
Atlanta, GA 30365

10. Project/Task/Work Unit No.

11. Contract(C) or Grant(G) No.
(C)
(G)

12. Sponsoring Organization Name and Address

13. Type of Report & Period Covered
Final

14.

15. Supplementary Notes

16. Abstract (Limit: 200 words)

Speakers for the Conference were Michael L. Privitera, Special Assistant, OFA, EPA, Headquarters, D.C. spoke regarding the NEPA and Federal Decision Making Process.

A. Alan Hill, Chairman, Council on Environmental Quality, Washington, D.C. spoke regarding "Improving the NEPA Process".

William R. Gianelli, Assistant Secretary of the Army, Washington, D.C. spoke regarding "Reform of the Corps Regulatory Program"

and

James T.B. Tripp, Senior Attorney Environmental Defense Fund, N.Y., N.Y. spoke regarding "The Federal Governments' Effort to Dismantle the Clean Water Act 404 Program: The Counteroffensive Begins."

17. Document Analysis a. Descriptors

b. Identifiers/Open-Ended Terms

c. COSATI Field/Group

18. Availability Statement	19. Security Class (This Report)	21. No. of Pages 142
	20. Security Class (This Page)	22. Price

(See ANSI–Z39.18) See Instructions on Reverse OPTIONAL FORM 272 (4–77)
(Formerly NTIS–35)

PB83-204834

United States
Environmental Protection
Agency

Region 4
345 Courtland Street, NE
Atlanta, GA 30365

EPA 904/9-83-110
March 1983

EPA

Sixth Annual Environmental Review Conference

October 21-22, 1982

Atlanta Marriott Hotel
Atlanta, Georgia

REPRODUCED BY
NATIONAL TECHNICAL
INFORMATION SERVICE
U.S. DEPARTMENT OF COMMERCE
SPRINGFIELD, VA. 22161

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SIXTH ANNUAL ENVIRONMENTAL REVIEW CONFERENCE

OCTOBER 21-22, 1983

Atlanta Marriott Hotel
Courtland and International Boulevard
Atlanta, Georgia

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WELCOME

SHEPPARD N. MOORE
CHIEF, ENVIRONMENTAL REVIEW SECTION
U.S. EPA, REGION IV

Welcome to Atlanta, Georgia, and the Sixth Annual Environmental Review Conference. It has become a tradition for us to assemble in Atlanta in the Fall to discuss how we might improve the review process. I want to extend a special welcome to those of you from outside our eight-state region.

We at EPA, Region IV reviewed approximately 100 draft and final environmental impact statements (EIS's) and 250 environmental assessments during FY 82. In the last two years we have seen a drastic reduction in the number of EIS's being prepared on Federal actions. This is due, in part, to the reduction in the number of new Federal projects. However, there is also a definite trend towards well prepared environmental assessments, followed by a finding of no significant impacts (FONSI). We are especially pleased to have Michael Privitera, Special Assistant to the Director, EPA's Office of Federal Activities, and Alan Hill, Chairman of the Council on Environmental Quality, to bring us some ideas on further improving the NEPA process.

We also reviewed over 2,000 Section 10/404 permits. As you all may be aware, there is great interest in regulatory reform and the 404 program is one of the programs that have been identified for change. We are fortunate to have with us today William Gianelli, Assistant Secretary of the Army for Civil Works, to discuss this reform. We are also fortunate to have James Tripp, Senior Attorney for the Environmental Defense Fund, who will tell us why he disagrees with the proposed reform.

Following the speakers, we will conduct four workshops. Each workshop will be held four times so that you may have the opportunity to attend all of the workshops if you wish.

At this time, I would like to recognize Charles R. Jeter, Regional Administrator, EPA, Region IV.

discussions this morning and throughout the whole Conference, we can seek ways to do a better job and, to the extent posible, remove unnecessary burdens.

Again, I want to welcome you to the Conference. We are going to be here for the presentations today and if we can be of any assistance to you, please let us know. Thank you.

OPENING REMARKS BY

CHARLES R. JETER
REGIONAL ADMINISTRATOR
U.S. EPA REGION IV

Thank you, Shep! I just want thank those members of my staff who have worked hard to put together a good Environmental Review Conference. I hope that this Conference will enable all of us to get a better feel for the complexities of the review process and develop more efficient methods of carrying out our environmental mandates. I impressed with the turnout and want to thank all of you for attending. I am sure you will benefit from both the program speakers and the dialogue in the workshops.

I would like to offer three items that I think are very critical to all areas of environmental assessment. The first is the importance of working closely together to achieve our mutual goal of environmental protection. We do this through such means as early coordination, careful understanding of important issues, agreement on what assumptions we will use to base our decisions, and a thorough understanding among the involved parties. I think all of this is best achieved through the scoping process. Using this technique at the onset of project formulation minimizes surprises down the road and leads to a better plan than would usually be developed otherwise.

Secondly, one of the major objectives of not only the assessment program but the entire Agency, and I think in all of government, is to make good, scientific decisions--decisions based on facts rather than emotions. In this regard, we at EPA continually look to scientific data. We are always trying to improve the quality and quantity of this information. To meet this need we are presently conducting research in such complicated areas as toxic and hazardous materials. Anytime an agency deals with issues which have potential for significant environmental concern, to include almost the whole spectrum of adverse impacts, a great deal of emotion comes into play. As a result, we need to make sure, to the extent possible, that we have good scientific foundations for our decisions. Similarly, when we are dealing with our diminishing wetlands resources, we need to be very thorough in our analysis of the impact of a particular project.

The last item I want to touch on is regulatory reform. I define this as making better decisions to protect the environment, in a timely fashion, with reduced administrative burdens. This applies not only to us in the regulatory community, but also to those of you who are trying to complete projects. I would hope that in the

"NEPA AND FEDERAL DECISION MAKING"

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Mr. Moore, Mr. Jeter, fellow speakers, ladies and gentlemen, it is a pleasure to participate in this important annual conference. NEPA and the Federal Decision making process is not only my topic for today, but also a subject to which the Environmental Protection Agency and its Office of Federal Activities, particularly, devotes a good deal of time and thought. This morning I will attempt to summarize and elaborate on some of these thoughts, but first let me say how good it is to be back in Atlanta. I know you probably feel Washington is a good safe distance away. But for me, I'm sorry Atlanta isn't just around the corner.

As you have heard, I am from the Environmental Protection Agency's Office of Federal Activities, where, I have gained a special perspective on EIS preparation and review. This special perspective about the way NEPA is operating may be less unique than I know. Others are also aware of problems in the NEPA process which it's framers either did not anticipate or at least are not the ones to pin the blame upon.

For this reason, I would like to share with you some of the problems I view in terms of EIS preparation and processing. In my mind they get to the heart of the misuses of NEPA, and are responsible for complicating and diluting the important role of the agency decision maker. Towards the end of this presentation, I will offer a few of my own suggestions I want you all to think about as possible solutions or improvements.

"NEPA AND FEDERAL DECISION MAKING"

The Office of Federal Activities is EPA's central environmental affairs office. We are responsible for all EPA NEPA compliance, oversight on federal facilities' pollution abatement compliance, and, something Mr. Gianelli will address more in a few minutes, most of the Agency's "dredge and fill" regulatory compliance. The NEPA component of our office under our 309 responsibility spends much of its time commenting on other agencies compliance activities. In this regard we review selected Environmental Impact Statements from other agencies.

EPA's Regional Offices most often serve as the principal reviewer of almost all EIS's - nearly 600 draft and 600 final EIS's annually. To augment this effort OFA provides guidance, assistance, and decisions as necessary. In this sense, we serve as the principal reviewer for those EIS's which concern more than one region or which involve major policy issues on which the Agency has not developed its position. In other words, OFA provides general systems management and coordinates the development and presentation of EPA's position on unique or controversial EIS's.

So much about OFA. I was specifically asked to speak about NEPA, and the correlating role of the federal agency decision maker in the NEPA process. In 1969 Congress passed a law that explicitly altered the way the federal government is to consider the environment, and the way the government is to make decisions about major federal projects. The National Environmental Policy Act (NEPA) declared that in doing its business, the government was to seek "create and maintain conditions under which man and nature can exist in productive harmony". Towards this end, the law requires federal agencies to consider environmental factors in their decision making. And in some cases to include in these decisions a comprehensive examination of alternatives, an analysis of expected impacts, and a balancing of environmental, social, and economic interests.

Having spoken with many people this past year with much first hand experience in this area, it difficult to show that the objectives of this venerable law are being achieved. The reason is that after 12 years, Federal agencies still lack standard criteria for evaluating these objectives, as well as a standard review procedure for looking at the Environmental Impact Statement. And in spite of valiant attempts to attain the opposite, we have gotten bogged down in details that serve less to ensure economic and environmental balance, than to ensure project slowdowns, litigation, and sometimes the unnecessary aborting of projects altogether.

At the heart of some of my misgivings about the NEPA process is the apparent failure on the part of bureaucrats and the public alike to understand the role of the Environmental Impact Statement, the Finding Of No Significant Impact and the Environmental Assessment in the total picture of making worthy decisions about significant federal undertakings. Unless some changes are made or - at least attitudes are made to change - the impact assessment process will increase as a vehicle for expressing general discontent over a development proposal, rather than become the research tool it is meant to be in the formulation of final decisions. It will continue to confuse dispute over values with good science and wrongly misconstrue a process of analysis which by nature is judgmental with something thought to be objective.

To appreciate the evolution of the environmental impact statement, and to understand the difficulty is can cause, it is necessary to take a look at NEPA itself.

In 1974, the environmental commentator, Gilbert F. White wrote "No federal legislation of recent years bears greater potential significance for the management of the environment in the United States than does Section 102 of the National Environmental Policy Act of 1969. And no other legislation inspires a more sober recognition of the risk of uncertainty attending current efforts to assess the effects of manipulating soil minerals, water, air, vegetation, transport, and land. In the tradition of earlier attempts to specify the impacts of human interventions in interacting hydrological, biological, and social systems, the environmental impact statements requried by Section 102 confront noble aspiration with seedy and incomplete performance."

I believe this twin edged assessment is still true.

No one in this room can deny that NEPA is a broadly worded congressional enactment that lacks precise direction for administrators. Its general intent was clear, but its brevity and lack of precision have left administrators considerable discretion. For this reason it is not surprising that there has often existed a gulf between the expectation of the NEPA supporters and the decision making of federal agencies.

NEPA can be said to insist that agencies in order to satisfy decision-making routines have to incorporate an identification and an evaluation of the environmental impacts of their actions. The effect of the act, then, is to require the Agencies to specify the likely impacts of their proposed projects, to obtain the comments of other interested agencies, and to make public their own findings and the comments of others.

On paper this sounds admirable until we recognize that the controversies stemming from this broad law have been the consequence of a system of governance in which piecemeal, incremental decision making has come to predominate and the role of the courts has superceded the role of the agencies in deciding what constitutes reasoned environmental decision making.

When NEPA was enacted, agencies were presented a new law whose import for their daily activities was largely undefined. It was the early 1970's and the environmental movement like the public interest movement in general began to recognize previously untapped power which lay in the judiciary for remaking legislation in their own likeness. To a great degree the result has been that environmental interests and the seeming lack of agency agresiveness to respond to the difficulties raised by NEPA produced in many instances judicial decisions which required overly strict agency compliance with the statute.

Over time, NEPA's meaning has evolved and revolved through countless court decisions in which the courts have showed considerable willingness to overrule deliberate and sincere agency efforts in order to fashion the statute in the mold we find it today.

Technically, NEPA's requirement is purely procedural, and Title I of the Act is no more than a policy statement and an authorization for agencies to consider environmental effects in carrying out their programs. In doing so, the agencies are to alert the Congress, other agencies and the public of the environmental effects of the proposed action. Again, technically, the agency is free to on balance permit adverse environmental effects, no matter how severe in making the ultimate decision, assuming, of course, that it has properly weighed these effects against other competing factors.

But what may be said as "technically" and what has come to be seen as legal interpretation are two different things, for the judiciary has in effect ruled that NEPA requires Federal Agencies to administer their duties consistent with the court's interpretation of NEPA's goals.

In so doing, the judiciary has bifurcated an already complicated decision making process. And, judges and lawyers have laid claim to the environmental expertise once popularly thought to rest within the federal agencies themselves.

Decision making in the real sense or in the sense of federal agencies making decisions about their own actions is on shakey ground. Where once decisions could be made that took environmental impacts into consideration, these impacts have now become paramount in the decision making process, and the Environmental Impact Statement often becomes in effect the sole weight on which decisions are made.

In other words, we have come to treat the EIS as a kind of amicus curiae, or friend of the court. In this new era of judicial management of environmental activities it is no longer necessary for a party to show a high level of particularized injury in order to seek remedy in the courts: any alleged violation of NEPA, and this is where the EIS comes in, has become grounds for stopping a project until the regulations have been met.

The integrity of environmental impact statements has been threatened by two unique tendencies of the current wave of advocacy. One is the strong temptation, enforced by the level of enthusiasm for environmental (protection) action to emphasize almost irrelevant, but at best tangential, investigations that will be used ultimately to support prospective advocacy against the project proposed. This confuses the process. A second is the expectation that much action on the statements will take place in the public arena. To that extent, there will be temptations for investigators to choose topics, select materials, and present findings with an eye to the rhetorical demands of the forum. This makes for a less than useful EIS to the decision maker and makes it more contentious than it probably should be.

It should be clear, but it is not clear, to all who examine environmental systems that there can be no perfect complying with the instructions in Section 102, much less CEQ's regulations. The perfect Statement can inevitabaly be attacked as lacking

1. A complete description of the likely biological, physical and economic impacts of the proposed work, and

2. A complete description of all practicable alternatives to the proposed work.

The first is unattainable because man lacks knowledge of important parts of most of the systems which would be disturbed. We can predict certain events without fully understanding all the processes involved, as with the effect of thermal pollution on fresh water organisms. But for a greater number of phenomena neither understanding nor predictive skill is sufficiently strong to permit confident forecasts of what will happen.

Additionally, if it were practicable to quantify all of the impacts of all the alternatives, a third deficiency would prevent us from producing a perfect impact statement. This is the difficulty of attaching weights to the numerous impacts in order to permit social evaluation. Such evaluation requires agreement on social aims and on the value system to be used in assessing the effects of a given action in achieving those aims. Frequently the description is mixed up with evaluation and this is to be expected, but the processes are different. It is possible to measure a change in soil productivity or lung cancer morbidity or the time consumed in the journey to work. But assigning social value to these quantities for purposes of comparison and choice is especially troublesome.

So where does all this get us? As decision makers how do we restore sense and balance to the protracted EIS process; how do we keep the courts away from an area they are not equipped to understand; how do we return to making sensible decisions in which a number of factors are allowed to contribute and to compete in that final decision; and finally, how do we involve the public in such a way as to actually determine the scope of a project or the limits of the EIS that may need to be prepared, rather than create a public information tool that results in no meaningful limits? In short, how do we get back on the course that insures the "productive harmony" inherent in NEPA's preamble and away from the politicization that has become a part of what should be scientifically based decisions?

Some have suggested that to begin with, either with or without formal administrative or legislative direction, authors and overseers of major federal actions could use early scoping sessions to actually encourage more environmental mediation between developers, and the affected public. Membership in public participation efforts become a critical issue when there is an obvious imbalance in input. Congressional intent, agency behavior, clarification of roles and "representativeness" are major factors in promoting or inhibiting similar disputes among interest groups. A kind of environmental arbitration can foreclose at the bginning of a project the likeliness that an EIS will end up in litigation. Perhaps this is something the workshop on EIS preparation and review might shed some light upon.

A second recommendation deals with the enviromental impact statement itself and all the associations or details this conjures up. I think it has been forgotten that the EIS was not designed to be the decision making process itself. Rather it must be seen that it can be a useful tool in the decision making process. For it to be useful, it must not only forecast environmental effects of a certain action, but it must also indicate *their* significance. In this era of new or relatively new CEO regulations, the machinery for producing environmental assessments, much less environmental impact statements, has still not begun to mesh satisfactorily with the machinery for making decisions. I can offer no immediate ideas for rolling back the EIS, for standardizing it. For starters perhaps a homogenizing of the 147 or so sets of agency regulations governing this process, the encouragement of more generic EISs or perhaps a simple avoidance of the problem through the creation of more categorical exemptions. It's a difficult problem we must consider not only alone, but in relation to the next issue.

Very simply, and again I offer this as my own opinion, the role of the courts in implementing the National Environmental Policy Act needs to be limited. Under the present status of the law the ultimate decision maker on many projects under NEPA is a judge. No matter how well an agency performs in compliance with NEPA a cause of action can be stated alleging that the performance was inadequate. The costs of delay and of litigation itself coupled with uncertainty as to how any one judge may apply NEPA law (particularly to a project not favored by the judge), place tremendous pressure on the project and give those bringing the suit great power to manipulate the agency, to modify the project and make special concessions.

One way to alleviate this serious problem would be for the Congress to give finality to the EIS review and allow only very limited judicial review of the decision already made by the agency. This would place all the energy to stop or alter a project up front where it belongs and where it can more usefully be mediated, in the scoping process and in the development of the EIS.

It is tempting to believe that if we did a better job in predicting and assessing impacts, these conflicts would go away. Indeed, this is precisely the assumption of the courts: their response to allegations that not enough alternatives have been considered is to require the consideration of more. Similarly, the reaction of public officials to charges that a study of a particular environmental hazard is biased is to call for the creation of a blue-ribbon panel of scientists to do an objective study that will lay to rest, once and for all, questions about the problem at hand. These responses are based on the same premise as NEPA: that the "right" information is out there waiting to be gathered, and that once collected, it will help us find the "right" solution. But when environmental disputes stem from value differences, the conflict cannot be resolved merely with better information.

When we attempt to resolve value conflicts by appeal to expert analysis, the analysis often becomes a lightning rod for underlying differences. No matter how conscientious and impartial an agency, its predictions will not be believed if people fundamentally disagree on what the future holds. And no matter how solicitous an agency is in obtaining different points of view, people will not support its decision if they disagree with the procedures used to balance competing interests.

Technical analysis is limited to being a technical conflict resolution. If we are to do better, we must spend more time trying to build consensus among legitimate competing interests through negotiation and compromise. To do otherwise is to treat the symptoms and not the disease.

Thank you.

"IMPROVING THE NEPA PROCESS"

A. ALAN HILL, CHAIRMAN
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C.

GOOD MORNING, IT IS INDEED A PLEASURE TO BE ABLE TO PARTICIPATE IN REGION IV'S SIXTH ANNUAL ENVIRONMENTAL IMPACT STATEMENT CONFERENCE. I AM ESPECIALLY PLEASED TO BE HERE TODAY BECAUSE I HAVE FOUND THAT, OVER THE PAST YEAR AND A HALF AS CHAIRMAN OF THE PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY, I HAVE NOT HAD ENOUGH OF A CHANCE TO TALK CANDIDLY WITH PEOPLE IN THE FIELD WHO HAVE TO IMPLEMENT THE POLICIES THAT WE IN WASHINGTON DEVISE.

THE PARTICIPANTS AT THIS CONFERENCE ARE PREDOMINATELY THOSE WHO EITHER PREPARE EIS'S FOR THE FEDERAL AGENCIES OR REVIEW THE EIS'S THAT HAVE BEEN PREPARED. YOU ARE THE ONES WHO HAVE TO LISTEN TO THE CONCERNS OF APPLICANTS AND CITIZENS GROUPS, AND THAT HAVE TO WORRY ABOUT WHETHER THE EIS YOU HAVE PREPARED WILL WITHSTAND CHALLENGE IN COURT. I BELIEVE THAT IT IS AS IMPORTANT FOR THE POLICYMAKERS TO HEAR HOW THE POLICIES THEY HAVE STRUCTURED ARE WORKING AS IT IS FOR YOU TO LISTEN TO US EXPLAIN OUR POLICIES.

I DO HOPE THAT THROUGH THE COURSE OF THE DAY YOU WILL LET ME AND MY STAFF HEAR WHAT DAY-TO-DAY PROBLEMS YOU HAVE HAD LIVING WITH NEPA AND ANY PRACTICAL SOLUTIONS YOU MAY HAVE FOR DEALING WITH THOSE PROBLEMS.

During the past year and a half, I have initiated a number of projects at CEQ. We are taking a hard look at the Federal Government's ability to accurately forecast future environmental problems. The Government's lack of forecasting capability is a problem that the Global 2000 Report to the President, prepared by CEQ in 1980, found to be a pressing one. We are also looking very carefully at the issue of acid rain and we house the Interagency Task Force created by Congress to coordinate acid rain research efforts. Finally we are actively participating in the President's regulatory reform program with respect to the NEPA process. Because the NEPA process is the subject of this conference, I would like to explain what we are doing here in some detail.

Let me first make clear that the Reagan Administration fully supports the goals and policies of the National Environmental Policy Act. In our view it is critical that agencies, before acting, know the environmental consequences of proposed actions and have compared the environmental consequences of reasonable alternatives. As we all know, NEPA does not require that an agency choose an alternative that is the least environmentally adverse. It does require that an agency understand the environmental consequences of the actions it proposes to take and minimize those consequences if practical.

The CEQ regulations issued in 1978 were designed to provide a blueprint for agencies to use in implementing the NEPA

PROCESS. THE REGULATIONS WERE INTENDED TO REDUCE PAPERWORK ASSOCIATED WITH THE PROCESS, ADD CONSISTENCY TO THE PROCESS AND HOPEFULLY, REDUCE THE LITIGATION THAT HAS BECOME ASSOCIATED WITH THE PROCESS.

ONE OF MY FIRST ACTS AS CHAIRMAN WAS TO INITIATE A PROJECT TO SEE IF THE CEQ REGULATIONS HAD CARRIED OUT THESE GOALS. THEREFORE, OVER THE PAST YEAR WE HAVE ON SEVERAL OCCASIONS REQUESTED COMMENTS FROM THE AGENCIES AND THE PUBLIC ON HOW THE CEQ REGULATIONS WERE WORKING.

FURTHER, WE HAVE PRESENTED A REVIEW OF THE NEPA PROCESS IN A SENATE OVERSIGHT HEARING. WE EVEN HELD A PUBLIC MEETING AT CEQ.

THROUGHOUT OUR REVIEW PROCESS I HAVE BEEN IMPRESSED BY THE THOUGHTFUL COMMENTS PRESENTED. THE COMMENTS BY REGIONAL AND HEADQUARTERS STAFFS HAVE BEEN MOST HELPFUL.

I WOULD LIKE TO BRIEFLY SUMMARIZE SOME OF THE THINGS WE HAVE FOUND IN ANALYZING THE COMMENTS WE RECEIVED.

FIRST WE ASKED ABOUT THE "SCOPING" PROCESS. AS YOU KNOW, THE CEQ REGULATIONS REQUIRE THAT AGENCIES "SCOPE" AN EIS TO DETERMINE WHICH ISSUES ARE SIGNIFICANT AND WHICH ARE NOT. THIS PROCESS MUST BE A PUBLIC ONE. MOST COMMENTERS BELIEVE THAT THE SCOPING PROCESS IS A USEFUL PROCEDURE TO IDENTIFY CONTROVERSIAL ISSUES. GENERALLY, THOSE WHO BELIEVE OTHERWISE THINK IT IS NOT USEFUL BECAUSE MEETINGS ARE POORLY ATTENDED, THE FOCUS IS ON THE PROPOSAL ITSELF RATHER THAN IDENTIFYING ISSUES TO BE ANALYZED, OR THE CONTROVERSIAL ISSUES HAVE ALREADY BEEN IDENTIFIED.

ALMOST ALL THE COMMENTERS BELIEVE THAT THE EARLIER THE EIS PROCESS AND SCOPING BEGINS, THE MORE EASILY IT CAN BE

INTEGRATED INTO AN AGENCY'S PLANNING PROCESS AND THE LESS LIKELY THE EIS WILL BE USED TO JUSTIFY DECISIONS ALREADY REACHED.

ONE GROUP WHICH CRITICIZES THE TIMING OF THE SCOPING PROCESS CONSISTS OF INDUSTRY MEMBERS WHO MUST OBTAIN FEDERAL PERMITS FOR PRIVATE PROJECTS. THESE INDUSTRY COMMENTERS COMPLAIN THAT THE SCOPING PROCESS OCCURS TOO LATE FOR GOVERNMENT AGENCIES BECAUSE DECISIONS CONCERNING PROJECT FEASIBILITY, ENGINEERING, DESIGN, DEVELOPMENT PLANS, AND FINANCING HAVE BEEN MADE LONG BEFORE SCOPING OFFICIALLY BEGINS. THEY SUBMIT THAT THE RELEVANT AGENCIES ARE INVOLVED AND PROVIDE SIGNIFICANT INPUT DURING THE PLANNING PHASE OF A PRIVATELY INITIATED PROJECT. THESE COMMENTERS ARGUE THAT, THEREFORE, BY THE TIME OFFICIAL SCOPING BEGINS, THE CONTROVERSIAL OR SIGNIFICANT ISSUES ARE ALREADY KNOWN. FOR THE SCOPING PROCESS TO HAVE VALUE IN DECISIONMAKING FOR THEM, THESE INDUSTRY APPLICANTS THINK THAT SCOPING MEETINGS SHOULD BE HELD WHEN THE APPLICANT IS STILL IN THE FORMULATING STAGE OF A PROJECT.

WE ARE NOW IN THE PROCESS OF DEVELOPING GUIDANCE DOCUMENTS TO THE FEDERAL AGENCIES WHICH WILL ADDRESS SOME OF THE PROBLEMS IDENTIFIED WITH THE SCOPING PROCESS. FOR EXAMPLE, WE WILL BE SUGGESTING THAT AGENCIES RECOGNIZE THE SITING WORK APPLICANTS HAVE DONE AND INTEGRATE THIS WORK INTO THE SCOPING PROCESS. WE WILL STRONGLY SUGGEST THAT AGENCIES END THE SCOPING PROCESS AT THE PRE-DRAFT EIS STAGE BY PUBLICLY NOTING THE ALTERNATIVES AND ISSUES THE AGENCY HAS FOUND TO BE SIGNIFICANT. WE WILL BE MAKING OTHER SUGGESTIONS WHEN THIS GUIDANCE DOCUMENT IS PUBLISHED THIS FALL.

WE ALSO ASKED WHETHER CATEGORICAL EXCLUSIONS -- THAT IS, THOSE ACTIVITIES WHICH DO NOT REQUIRE EITHER AN EIS OR AN ENVIRONMENTAL ASSESSMENT -- HAVE BEEN ADEQUATELY IDENTIFIED BY THE VARIOUS AGENCIES. MOST COMMENTERS THINK THAT ADDITIONAL CATEGORICAL EXCLUSIONS ARE NECESSARY. MANY INDICATE THAT EXISTING CATEGORICAL EXCLUSIONS ARE TOO RESTRICTIVE. THEY ALSO BELIEVE THAT THE CURRENT PROCEDURES TO ADD CATEGORICAL EXCLUSIONS ARE CUMBERSOME. MANY BELIEVE THAT THE CONCEPT OF CATEGORICAL EXCLUSIONS CANNOT BE ADEQUATELY ADDRESSED BY A LIST OF ACTIONS. THEY BELIEVE THAT A DETERMINATION THAT A PROJECT CAN BE EXCLUDED FROM NEPA REVIEW SHOULD BE BASED ON THE DEFINITION OF CATEGORICAL EXCLUSIONS CONTAINED IN THE CEQ REGULATIONS (40 CFR 1508.4) AND NOT ON A FIXED AGENCY LIST.

A FEW OF THE COMMENTS INDICATE THAT AGENCIES REQUIRE TOO MUCH PAPERWORK TO DOCUMENT THAT THE PROPOSAL CAN BE CATEGORICALLY EXCLUDED. IN MY VIEW, AN AGENCY SHOULD RARELY NEED TO DOCUMENT THE FACT THAT AN ACTIVITY IS CATEGORICALLY EXCLUDED FROM NEPA REVIEW. OTHERS INDICATE THAT AGENCIES ARE BEING OVERLY CONSERVATIVE IN INTERPRETING CATEGORICAL EXCLUSION CRITERIA AND ARE REQUIRING ENVIRONMENTAL ASSESSMENTS BECAUSE OF THE FEAR OF LITIGATION.

BECAUSE OF THESE COMMENTS, WE ARE ASKING AGENCIES TO REVIEW THEIR CATEGORICAL EXCLUSIONS TO DETERMINE IF THEY CAN BE EXPANDED. WE HAVE HEARD STORIES OF AGENCIES WHICH PREPARE THOUSANDS OF ENVIRONMENTAL ASSESSMENTS A YEAR BUT ONLY A

HANDFUL OF EIS'S. IF THIS IS HAPPENING AT YOUR AGENCY, THEN THAT INDICATES TO ME THAT YOU NEED TO TAKE A LOOK AT THE KINDS OF THINGS YOU ARE DOING EA'S FOR TO SEE IF SOME OF THOSE ACTIVITIES CAN BE EXCLUDED FROM THE NEPA PROCESS.

THE COMMENTS RECEIVED ALSO INDICATE THAT FEW AGENCIES ARE USING THE TECHNIQUE OF ADOPTING ENVIRONMENTAL DOCUMENTS PREPARED BY OTHER AGENCIES. UNDER THE CEQ REGULATIONS, AGENCIES CAN ADOPT AN EIS PREPARED BY OTHER FEDERAL AGENCIES IN SOME CASES. THE QUESTION HAS BEEN RAISED AS TO WHETHER ENVIRONMENTAL ASSESSMENTS AND FINDINGS OF NO SIGNIFICANT IMPACT ARE ADOPTABLE. ALTHOUGH THE CEQ REGULATIONS ARE SILENT ON THIS POINT THERE IS NOTHING IN THE REGULATIONS THAT WOULD PRECLUDE SUCH ADOPTION AND WE ARE ENCOURAGING AGENCIES TO CONSIDER ADOPTING ENVIRONMENTAL ASSESSMENTS.

THE COMMENTS WE RECEIVED OVER THE PAST YEAR ALSO INDICATE THAT FEDERAL AGENCIES CAN SIGNIFICANTLY REDUCE TIME DELAYS AND THE COST OF EIS'S THROUGH BETTER INTERNAL AND EXTERNAL MANAGEMENT PRACTICES. THE MOST FREQUENT COMMENT FROM NON-FEDERAL COMMENTERS IS THAT THE FEDERAL LEAD AGENCY SHOULD IDENTIFY A PROJECT COORDINATOR TO OVERSEE THE EIS PROCESS. THIS PROJECT COORDINATOR WOULD BE ASSISTED BY AN INTERAGENCY PROJECT MANAGEMENT TEAM WHICH WOULD PERIODICALLY MEET TO DISCUSS THE STATUS OF THE EIS. THE PROJECT MANAGEMENT TEAM WOULD INCLUDE STATE AND LOCAL AGENCY REPRESENTATIVES (AND POSSIBLY CITIZEN GROUPS) AND WOULD ENSURE TIMELY AND EFFECTIVE COORDINATION AND PREPARATION OF THE EIS.

Federal agencies are also criticized by a number of commenters for not establishing and maintaining tight time schedules for preparing the EIS, for not providing responsive and timely review comments (e.g., "need more information" on an impact without identifying the information they really desire), for not maintaining tighter cost management over consultant contracts, and for not accepting the environmental processing of another Federal agency. Other commenters request that Federal agencies have their legal staff review EIS's in an attempt to reduce the chances of subsequent litigation.

The form and content of the EIS also received a considerable number of comments. The most frequent comment is that the EIS should encompass ALL Federal environmental requirements (i.e., endangered species, historic preservation, permits, and others).

As I indicated we are now finalizing a guidance document which will address the issues raised above and others. I do hope that those of you who actually write the EIS's will find this of value. Our efforts here are aimed at making the NEPA process work more efficiently. As I have already pointed out this Administration believes that the NEPA process is a useful one since it can identify potential problems at an early stage of the planning process. It also brings the public into the process at an early stage. In spite of contrary misconceptions, this Administration does

NOT VIEW PUBLIC PARTICIPATION AS A VEHICLE TO "STIR UP DISSENSION OR OPPOSITION TO A PROJECT". INSTEAD IT IS CRITICAL FOR A REASONED ANALYSIS OF THE PROPOSAL.

CEQ TAKES ITS NEPA OVERSIGHT RESPONSIBILITIES SERIOUSLY. WE WILL CONTINUE TO LOOK FOR WAYS TO MAKE THE PROCESS WORK BETTER. I REQUEST THE HELP OF YOU AND YOUR COLLEAGUES TO FURTHER OUR EFFORTS.

QUESTIONS FROM THE AUDIENCE FOLLOWING MR. HILL'S PRESENTATION:

Mr. Hill:

Question: Going back to the question Mr. Privitera raised, does the Administration intend to seek legislation to limit access to the courts for NEPA cases?

Answer: This point has been raised by Mr. Privitera and others. At CEQ we have not finished our internal thought process on this issue. The best defense of the NEPA process is to make the process operate as efficiently and as economically as possible.

In general, if a case can be made that the majority of NEPA suits are brought for non-meritorious reasons, that is, for slowing or stopping a project, then access to the courts through NEPA should be examined. In this regard, CEQ intends, after pursuing all judicial remedies, to ask the Congress to exclude psychological impacts in the nuclear industry from NEPA review.

Question: How can the NEPA process be incorporated into private sector planning?

Answer: This is one of the toughest parts of NEPA; that is, the compatability of NEPA and the long-range planning efforts of private industry. As a case in point in the mining industry, planning for new mines is done on a 10-year cycle. This is long before any regulatory action is necessary. One possible answer to this is a joint review process such as is now in place in Colorado. In this process, the regulatory review of a project occurs early in the project planning, with the applicant as full participant. Despite problems, this may be an idea worth purusing.

Question: What is going to be in the guidance document that will be issued by CEQ and how will it change the CEQ regulations?

Answer: The new guidance document will expand the discussion in the regulations into three areas; (1) time schedules, (2) early scoping, and (3) joint review. In my view, the CEQ regulations are a living document; they are not cast in concrete. Changes will occur from time to time through a careful, and thoughtful process.

The guidance document is being developed with an eye on allowing each agency some flexibility. As an example, we would like to see the greater use of categorical exclusions by Federal agencies and we would also like to see more consistency between agencies in respect to what types of actions should be categorically excluded.

Question: Will CEQ try to shed any light on what is significant in respect to the CEQ regulations?

Answer: That is the sixty-four thousand dollar question! There is case law in this area but Congress has not addressed the question. In fact, it stayed far away from the question. Significance is determined in the eye of the beholder and we are hesitant to approach this area, believing that it should be left up to the individual agency.

Question: In respect to scoping, is CEQ doing anything to clarify when the scoping process for a project is closed? That is, is an agency required to address new issues raised after a formal scoping process?

Answer: CEQ encourages early scoping of projects; believing there is an appropriate early period when issues should be raised, but after that period new issues should not be raised. This is a function of the quality of the scoping process and I believe there is a need for better management in this area. As a generalization, I have noted that if the scoping process begins in a participatory manner, the process seems to flow very well. In this regard, I believe the Corps of Engineers does an excellent job in this area and in their public participation program in general.

Question: How many NEPA-related court cases are there, in average, per year?

Answer: As best I can recall, it is running about 140 cases per year out of 900 environmental documents (DEIS, FEIS, Supplements) per yer. This level has remained relatively constant for the past three years.

Question: What are the leading issues raised in the court cases involving NEPA?

Answer: The predominate issues are the challenge of an agency's decision not to prepare an EIS and challenges to the adequacy of prepared EIS's.

Question: When will the CEQ guidance document be out?

Answer: Hopefully by the end of December 1982.

Question: Is there any attempt by CEQ to tie all environmental regulatory requirements into one process?

Answer: This was considered by the Regulatory Task Force headed by Vice President Bush but was dropped because of its complexity. I personally would favor this type of reform.

Question: What about the cumulative impact of several small decisions?

Answer: This is covered in the CEQ regulations by the process of tiering. That is, a conceptual EIS for the entire program is prepared and then later, when a specific section of the project evolves, they are incorporated by reference to the relevent sections of the original environmental document.

Question: Who determines the sufficiency of an EIS?

Answer: This is done by EPA, with CEQ serving to review those environmentally controversial projects referred to it by others. Referred projects go to the General Counsel of CEQ, which initiates discussion between the involved agencies.

Question: What is the legal authority for CEQ?

Answer: CEQ was set up under the administrative guidance in Executive Order 11514, which also authorized CEQ to prepare implementing regulations for NEPA.

"REFORM OF THE CORPS' REGULATORY PROGRAM"

WILLIAM R. GIANELLI
ASSISTANT SECRETARY OF THE ARMY
WASHINGTON, D.C.

AS RENDERED

IT IS A PLEASURE TO BE HERE TODAY. I CONSIDER CONFERENCES SUCH AS THIS TO BE AN IMPORTANT FORUM FOR AGENCIES TO PASS ALONG AND DISCUSS POLICY MATTERS. JUST TUESDAY, I PARTICIPATED IN A REGULATORY CONFERENCE HELD BY THE CORPS FOR ITS FIELD REGULATORY LEADERSHIP AND FOUND IT VERY VALUABLE. YOUR AGENDA FOR THIS CONFERENCE CERTAINLY COVERS MANY OF THE KEY ISSUES FACING US TODAY. THE VARIETY AND BALANCE IN YOUR LIST OF SPEAKERS SHOWS AN AWARENESS THAT THERE IS MORE THAN ONE SIDE TO THESE KEY ISSUES. I AM PARTICULARLY PLEASED THAT YOU HAVE INCLUDED THE ARMY CORPS OF ENGINEERS' REGULATORY REFORM PROGRAM ON YOUR AGENDA.

DUE TO THE DIVERSITY OF THE AUDIENCE, LET ME BRIEFLY SUMMARIZE THE PROGRAM. THE CORPS' 80-YEAR-OLD REGULATORY PROGRAM STEMS PRINCIPALLY FROM TWO LAWS: THE RIVER AND HARBOR ACT OF 1899 AND THE CLEAN WATER ACT. UNDER SECTION 10 OF THE 1899 LAW, A CORPS' PERMIT IS NEEDED BY ANYONE WANTING TO BUILD STRUCTURES, DO WORK OR PLACE FILL IN THE NAVIGABLE WATERS OF THE UNITED STATES. SECTION 404 OF THE CLEAN WATER ACT REQUIRES A CORPS' PERMIT BEFORE FILL OR DREDGED MATERIAL CAN BE PLACED IN NAVIGABLE WATERS.

ALTHOUGH THE CORPS INITIALLY INTERPRETED THE TERM NAVIGABLE WATERS UNDER SECTION 404 TO BE THE SAME AS FOR THE 1899 RIVER AND HARBOR ACT, THE COURTS AND SUBSEQUENT REGULATIONS HAVE GREATLY EXPANDED THE DEFINITION OF SECTION 404 JURISDICTION TO INCLUDE ALL WATERS OF THE UNITED STATES AND ADJACENT WETLANDS.

LET ME EMPHASIZE AT THE OUTSET THAT THE CORPS OF ENGINEERS' REGULATORY PROGRAM DID NOT EVOLVE IN THE USUAL WAY. NORMALLY, THE CONGRESS IDENTIFIES A PROBLEM AND ITS COMMITTEES INVESTIGATE AND STUDY THE PROBLEM: THEN, LEGISLATION DESIGNED TO ADDRESS THE PROBLEM IS DRAFTED. HEARINGS ARE HELD. THE LEGISLATION IS AMENDED, HOPEFULLY IMPROVED. THEN THE LEGISLATION IS ENACTED.

THIS WAS NOT THE CASE WITH A GREAT DEAL OF THE ARMY'S 404 REGULATORY PROGRAM, PARTICULARLY THE MOST CONTROVERSIAL AND UNCERTAIN PARTS, INCLUDING THE PART THAT DEALS WITH WETLANDS.

INSTEAD OF DEVELOPING IN THE USUAL WAY, THE PROGRAM HAS RESULTED FROM A SERIES OF LAWSUITS, RESULTING REGULATIONS, AND ADMINISTRATIVE INTERPRETATIONS AND REINTERPRETATIONS.

MY POINT IS THIS: THE UNCERTAINTY AND UNUSUAL NATURE OF THE EVOLUTION OF THIS PROGRAM CONTRIBUTE TO ITS RIPENESS FOR REFORM.

SHORTLY AFTER ASSUMING OFFICE, THE PRESIDENT ESTABLISHED A TASK FORCE ON REGULATORY RELIEF AND PLACED VICE PRESIDENT BUSH IN CHARGE.

FROM THE LARGE NUMBER OF COMPLAINTS RECEIVED ON THE CORPS OF ENGINEERS' 404 REGULATORY PROGRAM THE VICE PRESIDENT IDENTIFIED THIS PROGRAM AS BEING AMONG THOSE MOST NEEDING REFORM. IN AUGUST OF 1981, HE DIRECTED THE ARMY AND OMB TO REVIEW THE CORPS' REGULATORY PROGRAM AND IDENTIFY ANY AREAS OF REFORM THAT WERE NECESSARY. I WAS ASKED TO HEAD THIS EFFORT.

IT WAS OBVIOUS THAT THE FRUSTRATION LEVEL AMONG THOSE PERMIT APPLICANTS WHO HAD TO COPE WITH THE DELAYS AND UNCERTAINTIES OF THE PROGRAM WAS VERY HIGH AND RISING. WE SOON LEARNED WHY: FOR THE 18,000 INDIVIDUAL PERMITS THAT THE CORPS PROCESSES ANNUALLY, THE AVERAGE PROCESSING TIME WAS 128 DAYS. THIS MEANS THAT IF A CITIZEN WANTED TO FILL EVEN A SMALL PORTION ON HIS OR HER OWN PROPERTY, THE CITIZEN COULD HAVE BEEN DELAYED FOUR MONTHS

JUST TO GET A CORPS' DECISION.

FURTHERMORE, IF SOMEONE OPPOSED THE REQUEST FOR A PERMIT, THE CITIZEN THEN JOINED RANKS WITH THE OTHER 31 PERCENT OF THE APPLICANTS WHO HAD SO-CALLED CONTROVERSIAL PERMITS AND THE AVERAGE PROCESSING TIME JUMPED TO 270 DAYS, OR MORE THAN EIGHT MONTHS. IN ADDITION TO INDIVIDUALS, A GREAT NUMBER OF COMPLAINTS WERE RECEIVED FROM PUBLIC AGENCIES AND PRIVATE CORPORATIONS SUFFERING COSTLY DELAYS IN DEVELOPING NEEDED PUBLIC WORKS PROJECTS AND PRIVATE DEVELOPMENT.

I HAVE LITTLE DOUBT THAT IF AN APPLICANT IS FACED WITH AN EIGHT-MONTH DELAY, HE OR SHE IS GOING TO BE VERY FRUSTRATED AND WONDER ABOUT THE EFFECTIVENESS OF HIS GOVERNMENT. AS IF THIS ISN'T BAD ENOUGH, IF THE PERMIT REQUIRED AN ENVIRONMENTAL IMPACT STATEMENT, THE CITIZEN FACED A 2½-YEAR DELAY. KEEP IN MIND THAT THE ORIGINAL GOAL OF THE CONGRESS WAS TO HAVE PERMITS GRANTED IN THREE MONTHS OR LESS.

PART OF THE DIFFICULTY UNDER THE 404 PROGRAM WAS THE MADE-UP ELEVATION PROCESS WHICH ALLOWED THE FINAL DECISIONS ON PERMITS TO BE FURTHER DELAYED, OFTEN FOR YEARS, WHILE AGENCIES TRIED TO

RESOLVE THEIR DIFFERENCES. THE PREVIOUS MEMORANDA OF AGREEMENT BETWEEN FEDERAL AGENCIES ALLOWED THAT IF A FEDERAL RESOURCE AGENCY DIDN'T LIKE ANY ASPECT OF A DISTRICT ENGINEER'S DECISION, THE CASE COULD BE UNILATERALLY ELEVATED TO THE DIVISION ENGINEER FOR DECISION. THEN, IF THE AGENCY DIDN'T LIKE ANY ASPECT OF THE DIVISION ENGINEER'S DECISION, IT COULD ELEVATE THE CASE TO THE CHIEF OF ENGINEERS. THIS ELEVATION PROCESS COULD CONTINUE, WITH ELEVATIONS TO MYSELF AND FINALLY TO THE SECRETARY OF THE ARMY. THIS FOUR-LEVEL REVIEW PROCESS ALONE WOULD TAKE AT LEAST 13 MONTHS BUT OFTEN TOOK MUCH LONGER. ALTHOUGH NOT A LARGE PERCENTAGE OF THE PERMITS WENT THROUGH THIS ELEVATION, THE THREAT OF SUCH DELAYS WAS OFTEN ENOUGH TO MAKE AN APPLICANT VULNERABLE TO ACCEPTING CONDITIONS ON THE PERMIT - NOT BECAUSE THEY WERE APPROPRIATE, - BUT BECAUSE THE THREAT AND RISK OF LONG DELAYS WERE SIMPLY UNACCEPTABLE TO HIM. I.E., A TWO-YEAR DELAY COULD RESULT IN A COST ESCALATION WHICH COULD RENDER THE PROJECT INFEASIBLE - JUST BECAUSE OF THE DELAY ITSELF.

IN AN ALREADY UNCERTAIN ECONOMIC CLIMATE, THE DELAYS, DUPLICATED EFFORTS, INCREASED COSTS WITHOUT CORRESPONDING ENVIRONMENTAL BENEFITS, AND STAGGERING PAPERWORK REQUIREMENTS CAUSED BY THIS

PERMIT PROGRAM, WERE SIMPLY UNACCEPTABLE.

TO CARRY OUT THE VICE PRESIDENT'S MANDATE FOR REFORM, WE ESTABLISHED A WORKING GROUP TO REVIEW THE CORPS' REGULATORY PROGRAM AND DEVELOP RECOMMENDATIONS FOR REFORM.

THE WORKING GROUP WAS MADE UP OF SENIOR OFFICIALS FROM THE OFFICE OF MANAGEMENT AND BUDGET, THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENTS OF INTERIOR, COMMERCE AND JUSTICE. INPUT WAS ALSO RECEIVED FROM THE DEPARTMENTS OF AGRICULTURE AND TRANSPORTATION, AS WELL AS THE COUNCIL ON ENVIRONMENTAL QUALITY. OUR RECOMMENDATIONS WERE SENT TO THE VICE PRESIDENT IN LATE JANUARY OF THIS YEAR.

ON MAY 7TH, THE PRESIDENTIAL TASK FORCE APPROVED THE MAJOR ELEMENTS OF OUR PROPOSAL AND ISSUED INSTRUCTIONS TO THE EPA, THE DEPARTMENTS OF INTERIOR AND COMMERCE AS WELL AS OURSELVES, TO IMPLEMENT THE REFORM WITHIN THE NEXT SIX MONTHS. I WOULD LIKE TO BRIEFLY RELATE THE HIGHLIGHTS OF THE TASK FORCE DECISIONS AND WHAT WE NOW HAVE UNDERWAY TO IMPLEMENT THEM.

FIRST, SEVERAL STEPS ARE BEING TAKEN TO

REDUCE THE TIME NEEDED TO OBTAIN A DECISION ON AN APPLICATION.

THE CORPS HAS ESTABLISHED VERY STRICT TIME LIMITS ON ITS IN-HOUSE PROCEDURES SO THAT, APART FROM REQUIREMENTS MANDATED BY LAW, A DECISION ON AN APPLICATION WILL USUALLY BE FORTHCOMING WITHIN 60 DAYS FROM RECEIPT OF A COMPLETED APPLICATION. THE CORPS WILL ALSO REVISE ITS APPLICATION PROCESS TO INDICATE WHAT INFORMATION IS REQUIRED OF THE APPLICANT TO INSURE THAT IN MOST CASES ALL NECESSARY INFORMATION IS RECEIVED AT THE OUTSET AND THAT REQUESTS FOR ADDITIONAL INFORMATION ARE LIMITED TO THAT WHICH IS ABSOLUTELY ESSENTIAL FOR A COMPLETE RECORD OF DECISION. IN THE PAST THERE HAS BEEN MUCH DELAY DUE TO ADDITIONAL INFORMATION BEING REQUESTED.

ADDITIONALLY, AND VERY IMPORTANTLY, THIS JULY, THE ARMY EXECUTED NEW MEMORANDA OF AGREEMENT UNDER SECTION 404(Q) WITH EPA AND THE DEPARTMENTS OF INTERIOR AND COMMERCE. THESE REPLACED THE PREVIOUS AGREEMENTS WHICH HAD THE LENGTHY ELEVATION PROCESS I MENTIONED EARLIER.

THE FUNDAMENTAL CONCEPT IN THESE NEW AGREEMENTS IS THAT, TO THE EXTENT POSSIBLE, ALL PERMIT

CASES WILL BE DECIDED BY THE DISTRICT ENGINEER OF THE CORPS. THE KEY GOAL IS TO INSURE WHAT THE LAW REQUIRES: FULL AND TIMELY CONSIDERATION OF THE VIEWS AND CONCERNS OF OTHER INTERESTED AGENCIES.

WHAT WE SHOULD NOT HAVE AND WHAT THE LAW DOES NOT REQUIRE AND WHAT PRINCIPLES OF GOOD GOVERNMENT RULE OUT ARE MULTIPLE REVIEWS, REPETITIOUS CONSIDERATIONS AND TIME-CONSUMING REHASHINGS.

IF AN AGENCY RECOMMENDS DENIAL OF A PERMIT IT CAN REQUEST THAT A DECISION BY THE DISTRICT ENGINEER TO ISSUE THE PERMIT BE REVIEWED AT A HIGHER LEVEL. BUT NOW THIS REQUEST MUST COME FROM THE ASSISTANT SECRETARY LEVEL OF THE AGENCY TO THE SAME LEVEL AT ARMY WHERE, IF THE REQUEST IS APPROVED, THE LEVEL OF THIS SINGLE REVIEW IS DESIGNATED. THIS ENTIRE PROCESS WILL REQUIRE 90 TO 120 DAYS DEPENDING ON THE LEVEL OF REVIEW. THIS WILL BE A SIGNIFICANT IMPROVEMENT OVER THE PREVIOUS SYSTEM WHICH OFTEN TOOK YEARS TO CONCLUDE.

THE SECOND ISSUE WAS A NEED TO COMPLY WITH THE INTENT OF THE CLEAN WATER ACT THAT THE STATES HAVE MORE AUTHORITY OVER THEIR WATERS. THE CORPS IS PROCEEDING WITH AN EVALUATION OF EXISTING STATE

PROGRAMS AND WILL THEN ISSUE GENERAL PERMITS, WITH APPROPRIATE SAFEGUARDS, TO THOSE STATES WHOSE PROGRAMS LARGELY DUPLICATE THE CORPS' PROGRAM.

FURTHER, EPA WILL BE AMENDING ITS REGULATIONS REGARDING STATE ASSUMPTION OF THE SECTION 404 PROGRAM TO PROVIDE INCREASED INCENTIVES AND SIMPLIFIED PROCEDURES AND TO REDUCE THE FEDERAL OVERSIGHT ONCE THE STATE HAS ASSUMED THE PROGRAM.

THE CORPS WILL NOT "SECOND GUESS" THE DECISIONS MADE BY STATE AND LOCAL GOVERNMENTS ON SUCH MATTERS AS ZONING AND LAND USE UNLESS THERE ARE CONSIDERATIONS OF OVERRIDING NATIONAL IMPORTANCE.

THIRD, WE KNOW THAT THE PRACTICE OF USING GENERAL PERMITS (OR PERMITTING WHOLE CLASSES OF ACTIVITIES SO THAT INDIVIDUAL PERMITS ARE NOT REQUIRED) IS LESS BURDENSOME ON THE PUBLIC. THE CORPS IS EXPANDING THE USE OF THESE GENERAL PERMITS BOTH TO MINIMIZE DELAY AND PAPERWORK AND TO ELIMINATE DUPLICATION WITH OTHER FEDERAL PROGRAMS. FURTHERMORE, THE CONCEPT OF A STATE OR REGIONAL GENERAL PERMIT, WHICH I ALREADY MENTIONED, RECOGNIZES THE STATES' ONGOING EFFORTS TO PROTECT THEIR ENVIRONMENT.

THE FINAL ISSUE AND PERHAPS THE THORNIEST IS THE JURISDICTIONAL QUESTION. THE TASK FORCE FOUND THAT, ALTHOUGH THE JURISDICTIONAL SCOPE IS UNCERTAIN, IT DOES NOT BY ANY MEANS ENCOMPASS ALL BIOLOGICAL WETLANDS. THE CORPS WILL ATTEMPT TO REDEFINE THE SCOPE OF THE PROGRAM IN ORDER TO INTRODUCE A DEGREE OF CERTAINTY INTO THE EXTENT OF JURISDICTION AND TO MAINTAIN ESSENTIAL PROTECTION OF THE CHEMICAL, PHYSICAL AND BIOLOGICAL INTEGRITY OF THE NATION'S WATERS. WE VIEW THIS AS A MANDATE TO REORIENT THE SECTION 404 PROGRAM TOWARD WATER QUALITY AS INTENDED IN THE CLEAN WATER ACT. UNFORTUNATELY, MANY HAVE BEEN VIEWING THE 404 PROGRAM AS ONE WHICH IS DESIGNED TO PROTECT THE NATION'S WETLANDS REGARDLESS OF WHETHER WATER QUALITY IS INVOLVED.

I MUST REEMPHASIZE THAT THE PRIMARY INTENT OF THE CLEAN WATER ACT, INCLUDING THE SECTION 404 PROVISION, WAS FOR THE PROTECTION OF WATER QUALITY. THE 1972 FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS MADE NO MENTION OF WETLANDS. AS NOTED EARLIER, THE CORPS' INVOLVEMENT IN WETLANDS ONLY CAME ABOUT THROUGH COURT RULINGS AND SUBSEQUENT REGULATIONS.

IT IS IMPORTANT TO POINT OUT THAT WETLANDS CAN BE DESTROYED IN A NUMBER OF WAYS WITHOUT ANY REQUIREMENT FOR A CORPS' PERMIT. THEY CAN BE DESTROYED BY EXCAVATING, DRAINING, FLOODING, CLEARING OR EVEN SHADING WITHOUT THE NEED FOR A CORPS' PERMIT, AS LONG AS THOSE ACTIVITIES DO NOT INCLUDE THE DISCHARGE OF DREDGED OR FILL MATERIAL.

SINCE THERE HAS BEEN MUCH CONTROVERSY OVER THE STATISTICS CONCERNING THE RELATIONSHIP OF THE CORPS' PROGRAM IN PRESERVING WETLANDS, I HAVE ASKED THE CORPS TO DEVELOP THE FIGURES WHICH WILL PLACE IN PERSPECTIVE THE ROLE OF THE 404 PROGRAM IN THE OVERALL AMOUNT COVERED BY LOSS OF WETLANDS. THE PRELIMINARY RESULTS INDICATE THAT THE WETLANDS INVOLVED UNDER THE CORPS' PERMIT PROGRAM ARE A VERY SMALL PART OF THE TOTAL ACREAGE OF WETLANDS IN THE UNITED STATES.

FOR EXAMPLE, OUR PRELIMINARY FIGURES SHOW THAT IN OUR NORTH ATLANTIC DIVISION WHICH COVERS THE EASTERN SEABOARD ABOVE NORFOLK, VIRGINIA, THERE ARE SLIGHTLY MORE THAN TWO MILLION ACRES OF WETLANDS THAT MIGHT BE UNDER THE CORPS' JURISDICTION. KEEPING IN MIND THAT 98% OF THE APPLICATIONS HAVE BEEN GRANTED IN THE PAST TEN YEARS, AT THE PRESENT RATE AT WHICH THE CORPS IS AUTHORIZING

FILLING, LESS THAN TWO PERCENT OF THESE WETLANDS WOULD BE FILLED DURING THE NEXT 100 YEARS. SIMILARLY, WITHIN THE JACKSONVILLE DISTRICT, IN THE NEXT ONE HUNDRED YEARS ONLY 1.4 PERCENT OF THE WETLANDS UNDER THE CORPS' JURISDICTION MIGHT BE FILLED AS A RESULT OF CORPS' PERMITS.

SO, IT IS CLEAR THAT SECTION 404 DOES NOT SERVE AS THE NATION'S COMPREHENSIVE WETLANDS PROTECTION LAW, AS LAUDABLE AN OBJECTIVE AS THAT MAY BE. LET ME EMPHASIZE THAT I RECOGNIZE THE IMPORTANCE OF WETLANDS. WE BELIEVE THAT IF THE NATION AND ITS ELECTED OFFICIALS TRULY DESIRE PROTECTION OF WETLANDS, LEGISLATION SHOULD BE CONSIDERED FOR THE STATED PURPOSE OF PROTECTING THE IMPORTANT WETLANDS, SIMILAR PERHAPS TO THE APPROACH USED TO PROTECT THE WILD AND SCENIC RIVERS.

THAT BRIEFLY SUMS UP OUR CHARTER FROM THE PRESIDENTIAL TASK FORCE AND HOW WE ARE ACTING ON EACH ELEMENT. WE INTEND TO ACCOMPLISH AS MUCH OF THIS AS WE CAN BY ADMINISTRATIVE AND REGULATORY CHANGES. AT THE END OF THIS YEAR, WE WILL EVALUATE OUR PROGRESS IN ACHIEVING LASTING, MEANINGFUL REFORMS THROUGH THESE MEANS, AND WHETHER WE HAVE BEEN SUCCESSFUL.

LOOKING IMMEDIATELY AHEAD, ON AUGUST 23RD, THE EPA PUBLISHED AN ADVANCE NOTICE OF PROPOSED RULEMAKING AS THEY PREPARE TO PUBLISH NEW GUIDELINES UNDER SECTION 404(B)(1). THE NEW GUIDELINES WILL SHORTEN AND SIMPLIFY THE EXISTING ONES WHICH ARE TOO COMPLEX, INFLEXIBLE, AND REDUNDANT AND WE WILL BE WORKING WITH EPA IN THIS EFFORT.

IN ANOTHER RECENT MOVE, WE PUBLISHED, ON JULY 22, NEW INTERIM FINAL RULES ON REGULATIONS WHICH HAD BEEN ORIGINALLY PROPOSED IN SEPTEMBER OF 1980. THEY PROVIDE A DEGREE OF RELIEF TO THE REGULATED PUBLIC AND ALLOW FOR FURTHER COMMENT BY INTERESTED PARTIES BUT THEY DO NOT FULLY IMPLEMENT THE CHARTER OF THE TASK FORCE.

WHILE THESE NEW REGULATIONS INCLUDE SEVERAL HUNDRED ACTUAL CHANGES, MOST OF THEM ARE MINOR "HOUSEKEEPING" CHANGES. INCLUDED, HOWEVER, ARE TWO MORE IMPORTANT CHANGES WHICH PROVIDE MOST OF THE REGULATORY RELIEF. THESE CHANGES ARE (1) REQUIRING MOST PERMIT DECISIONS TO BE MADE IN SIXTY DAYS, AND (2) EXPANDING THE NATIONWIDE PERMIT PROGRAM BY ADDING FIFTEEN NEW PERMITS FOR VARIOUS MINOR ACTIVITIES AND CHANGING THE SCOPE OF OTHERS.

I WOULD LIKE TO RESPOND TO SOME OF THE QUESTIONS WHICH HAVE BEEN RAISED AGAINST THESE INTERIM REGULATIONS.

THERE HAVE BEEN CLAIMS THAT THE EXPANDED USE OF NATIONWIDE PERMITS IS IMPROPER. TO PLACE THIS COMMENT IN PERSPECTIVE, NEARLY TWO-THIRDS OF ALL PERMIT APPLICATIONS RECEIVE NO COMMENTS AND ARE ROUTINELY GRANTED. IT MAKES GOOD MANAGEMENT SENSE NOT TO PUT A GREAT ADMINISTRATIVE EFFORT INTO THOSE WHICH ARE ROUTINE. IN ADDITION, A NATIONWIDE PERMIT IS NOT AN EXEMPTION FROM REGULATION AS SOME CLAIM. IT IS A LESS INTENSIVE FORM OF REGULATION. WE FEEL THAT THE NATION IS BEST SERVED BY FOCUSING OUR REGULATORY EFFORTS ON THOSE APPLICATIONS WITH SIGNIFICANT ENVIRONMENTAL CONSEQUENCES RATHER THAN FRITTERING IT AWAY ON PROCESSING MANY CASES WHERE THERE ARE NO OBJECTIONS. THE NATIONWIDE AND REGIONAL GENERAL PERMITS PLAY A MAJOR ROLE IN ALLOWING US TO DO THIS.

CORPS RESOURCES WHICH ARE FREED FROM THE UNNECESSARY PROCESSING OF INDIVIDUAL PERMITS CAN BE DIVERTED TO QUALITY MANAGEMENT AND CONTROL OF THE MORE SIGNIFICANT WATER RESOURCES ACTIVITIES. FURTHER, THE ENVIRONMENTAL ENFORCEMENT AND SURVEILLANCE PROGRAMS CAN BE SHORED UP WITH THESE

FREED RESOURCES.

THE SECOND MAJOR CONCERN WHICH HAS BEEN EXPRESSED ON THE INTERIM REGULATIONS IS RELATED TO EXPANDING THE GENERAL PERMITS FOR ACTIVITIES IN CERTAIN WATERS TO INCLUDE LAKES LARGER THAN TEN ACRES. THE PROPOSAL IS NOT AS EXPANSIVE AS IT MAY SEEM. IT EXTENDS COVERAGE ONLY TO NATURAL LAKES ABOVE THE HEADWATERS. WETLANDS AND MAN-MADE LAKES, INCLUDING THOSE OF GREATER THAN TEN ACRES IN SIZE, HAVE BEEN COVERED ABOVE THE HEADWARTERS BY A NATIONWIDE PERMIT SINCE 1977. FURTHERMORE, SAFEGUARDS WHICH I WILL DESCRIBE LATER WE BELIEVE ARE BUILT INTO THE NATIONWIDE PERMITS.

AN INTERDISCIPLINARY TASK GROUP OF 20 OF THE CORPS' MOST SEASONED REGULATORY PERSONNEL JUDGED THAT INTEREST FROM THE PUBLIC AND OTHER AGENCIES IN THESE TEN-ACRE LAKE AREAS WAS RELATIVELY MINOR DURING THE PAST FIVE YEARS AND DID NOT SUPPORT A CONTINUATION OF CASE-BY-CASE EVALUATIONS.

ADDITIONALLY, IN ALL THE COMMENTS RECEIVED, NO ONE WAS ABLE TO SPECIFY ANY PROBABLE DAMAGE WHICH WOULD RESULT FROM THE INCLUSION IN THE NATIONWIDE PERMIT OF LAKES GREATER THAN TEN ACRES.

IN THIS CONNECTION, THE CORPS DID AN ENVIRONMENTAL ASSESSMENT AND A 404(B)(1) EVALUATION WHICH INDICATED NO SIGNIFICANT RISK TO THE RESOURCES INVOLVED.

THE CORPS WILL REVIEW THESE NATIONWIDE PERMITS EVERY FIVE YEARS AND IS IMPLEMENTING A DATA COLLECTION SYSTEM SO THAT THERE WILL BE A GREATER DATA BASE FOR FUTURE ANALYSES.

A THIRD CONCERN ABOUT THE INTERIM FINAL REGULATIONS IS THAT THE NATIONWIDE PERMITS DO NOT COMPLY WITH SECTION 404(E) OF THE CLEAN WATER ACT WHICH REQUIRES THAT ACTIVITIES BE SIMILAR AND HAVE MINOR INDIVIDUAL AND CUMULATIVE IMPACTS.

WE BELIEVE WE HAVE BEEN VERY CAUTIOUS IN INSURING SUCH COMPLIANCE. GENERAL PERMITS BY THEIR VERY NATURE MUST BE TREATED IN GENERAL TERMS. WE HAVE TRIED TO STRUCTURE THESE PERMITS AND THEIR POTENTIAL ENVIRONMENTAL IMPACTS IN A REASONABLE MANNER TO COVER TRULY MINIMAL SITUATIONS IN THE FIELD. HOWEVER, WE DO RECOGNIZE THAT INFREQUENT SITUATIONS CAN ARISE WHERE THE NATIONWIDE PERMIT CONDITIONS MAY NOT PROVIDE THE DEGREE OF REGULATION NECESSARY TO PROTECT THE INTEGRITY OF THE NATION'S WATERS AND SO CERTAIN SAFEGUARDS ARE

NEEDED.

TO DEAL WITH SPECIFIC SITUATIONS, WE HAVE PROVIDED REGIONAL CONDITIONING AND DISCRETIONARY AUTHORITY WHEREBY NATIONWIDE PERMITS CAN BE MODIFIED ON A REGIONAL BASIS OR CAN BE OVERRIDDEN ALTOGETHER AND INDIVIDUAL PROJECT REVIEW REQUIRED IN CERTAIN INSTANCES.

FURTHER, THERE ARE CONDITIONS IN THE PERMITS WHICH REQUIRE THAT THE DISCHARGED MATERIAL BE FREE FROM TOXIC POLLUTANTS; THAT THE ACTIVITY HAVE NO EFFECT ON ENDANGERED SPECIES AND WILD AND SCENIC RIVERS; THAT THE DISCHARGE INTO WATERS AND WETLANDS BE AVOIDED OR MINIMIZED; AND THAT DISCHARGES INTO SPAWNING AND BREEDING AREAS BE AVOIDED, TO NAME BUT A FEW OF THE CONDITIONS. WE ARE HOPEFUL THAT THESE CONDITIONS PROVIDE SUFFICIENT PROTECTION TO OUR NATURAL RESOURCES AND ASSURE THAT WHATEVER IMPACTS MIGHT OCCUR, ARE MINIMAL.

THE NATIONWIDE PERMIT PROGRAM, INCLUDING THE PERMIT FOR DISCHARGES INTO CERTAIN WATERS, HAS BEEN IN EFFECT SINCE BEFORE THE LAST AMENDMENTS TO SECTION 404 IN 1977. IT HAS THE OVERWHELMING SUPPORT OF THE COMMENTING PUBLIC, AND IS CHARAC-

TERIZED IN THE PUBLIC RECORD BY A COMPLETE ABSENCE OF ANY SPECIFIED ADVERSE IMPACTS WHICH HAVE RESULTED OR MAY RESULT FROM THIS PROGRAM.

ADDITIONALLY, IN THE 1977 AMENDMENTS TO THE CLEAN WATER ACT, CONGRESS INCLUDED A PROVISION ALLOWING FOR THE ISSUANCE OF GENERAL PERMITS. THE LANGUAGE USED BY THE CONGRESS WAS TAKEN NEARLY VERBATIM FROM THE THEN-EXISTING CORPS' 404 REGULATIONS. IN GENERAL, CONGRESS INDICATED ITS FAVORABLE DISPOSITION TOWARD THE INCREASED USE OF THIS PRACTICE. WE CAN REVISE AS EXPERIENCE MAY DICTATE.

A FOURTH CONCERN IS THAT THE GOVERNMENT EFFICIENCY GENERAL PERMITS AIMED AT STRONG STATE PROGRAMS, ARE INAPPROPRIATE.

THE CORPS' REGULATIONS RECOGNIZE THAT IN A NUMBER OF STATES THERE ARE ON-GOING STATE AND LOCAL REGULATORY PROGRAMS WHICH LARGELY DUPLICATE THE CORPS' PROGRAM. WE REFER TO THE GENERAL PERMITS WHICH REDUCE THIS DUPLICATION AS "GOVERNMENT EFFICIENCY GENERAL PERMITS." WE HAVE FOUND THAT FOR THOSE INSTANCES WHERE ACTIVITIES ARE ALREADY BEING REGULATED BY OTHERS, THE REDUCTION IN DUPLICATION CAN ALSO GENERATE SIGNIFICANT SAVINGS. ONE ESTIMATE FINDS THAT THE AVERAGE COST

OF PROCESSING A SINGLE INDIVIDUAL PERMIT IS $2,500. DUPLICATING THIS COST AT TWO OR MORE LEVELS OF GOVERNMENT IS SIMPLY NOT GOOD GOVERNMENT.

I BELIEVE THAT PROGRAMS WHICH COMPLEMENT, NOT DUPLICATE, ONE ANOTHER WILL NOT ONLY SAVE TIME, MONEY AND REDUCE PAPERWORK BUT WILL HELP RESTORE FAITH IN GOVERNMENT AND FOSTER A BETTER PARTNERSHIP AMONG LOCAL, STATE, AND FEDERAL WATER RESOURCES PROTECTION AGENCIES.

OUR EXPERIENCE IN NORTH CAROLINA, FOR EXAMPLE, IS THAT A WELL-STRUCTURED GENERAL PERMIT WITH APPROPRIATE SAFEGUARDS IS ACCEPTABLE TO ALL CONCERNED PARTIES AND AVOIDS DUPLICATION OF EFFORT.

FINALLY, IN OUR EFFORTS TO TRIM PROCESSING TIMES, SOME CORPS' DISTRICTS BEGAN TO CUT BACK THE PUBLIC COMMENT PERIOD IN A BROADER WAY THAN WE INTENDED. THERE HAVE BEEN A NUMBER OF COMPLAINTS THAT THIS DOES NOT, IN SOME CASES, ALLOW ENOUGH TIME TO PROVIDE SUBSTANTIVE COMMENTS. OTHERS COMPLAIN THAT THESE TIME PERIODS ARE EXCESSIVE.

WE GENERALLY BELIEVE THAT A 30-DAY COMMENT

PERIOD IS APPROPRIATE. THE CORPS HAS ISSUED INTERNAL GUIDANCE THAT THE COMMENT PERIOD WILL NORMALLY BE 30 DAYS BUT THE DISTRICT ENGINEER MAY MODIFY IT IN THOSE CASES WHERE WARRANTED.

I MUST ADMIT TO BEING CONCERNED ABOUT THE RESISTANCE WE SEEM TO BE GETTING AT EVERY STEP. THERE ARE THOSE WAITING IN THE WINGS WHO HAVE URGED US ALL ALONG TO SEEK LEGISLATIVE SOLUTIONS. TO ILLUSTRATE THIS POINT, THERE HAVE BEEN 48 BILLS INTRODUCED IN THE PAST FOUR CONGRESSES TO AMEND THE SECTION 404 PROGRAM. WE HAVE OPTED, HOWEVER, TO TRY THE ADMINISTRATIVE APPROACH FIRST. WE BELIEVE THAT WE CAN DO A BETTER JOB, WORKING WITH OTHER AGENCIES.

ON THE JULY 22ND INTERIM FINAL REGULATIONS MOST PEOPLE REGARD THEM AS RELATIVELY MILD REFORMS. HOWEVER, WE HAVE ALREADY RECEIVED TWO NOTICES OF INTENT TO SUE UNDER SECTION 505 OF THE CLEAN WATER ACT.

WE ARE DISAPPOINTED IN THIS SEEMINGLY "KNEE-JERK" OPPOSITION AND ALL-TOO-FAMILIAR LITIGATION. WE ARE COMMITTED AND HAVE BEEN COMMITTED THROUGHOUT OUR REFORM EFFORT TO MAKING USE OF REASONABLE ADMINISTRATIVE CHANGES RATHER THAN GOING FIRST TO

THE LEGISLATIVE APPROACH. WE MAY, HOWEVER, FIND OURSELVES BEING PUSHED WHETHER WE LIKE IT OR NOT TO SEEK A LEGISLATIVE REMEDY.

WE MUST ACHIEVE A REGULATORY PROGRAM THAT PROVIDES A BALANCED APPROACH TO ENVIRONMENTAL PROTECTION AND WATER RESOURCES UTILIZATION IN THIS COUNTRY. WE INVITE YOUR SUPPORT AND PARTICIPATION AS WE MOVE FORWARD IN THIS IMPORTANT TASK.

IN CLOSING, LET ME RESTATE THAT THERE ARE VERY SERIOUS PROBLEMS WITH THE SECTION 404 PROGRAM AND RELATED PROGRAMS. THESE PROBLEMS ARE NOT GOING TO GO AWAY WITHOUT TRUE AND LASTING REFORMS. I AM SPEAKING OF REFORMS THAT WILL PROVIDE DECISIONS ON APPLICATIONS IN A REASONABLE TIME AND AT REASONABLE EXPENSE, BUT WILL DO SO IN A WAY THAT PROTECTS THE IMPORTANT ENVIRONMENTAL CONCERNS AT THE SAME TIME.

THANK YOU FOR THE OPPORTUNITY TO BE WITH YOU AND I'LL BE PLEASED TO ANSWER ANY QUESTIONS YOU MAY HAVE.

QUESTIONS FROM THE AUDIENCE FOLLOWING MR. GIANELLI'S PRESENTATION:

Mr. Gianelli:

Question: Will the current jurisdiction of the Section 404 program be markedly changed under the new regulations?

Answer: The jurisdiction question is one of the thorniest issues that we have to face. We will continue to have dialogue with other agencies on the question; but, ultimately, I believe this question will have to be resolved by Congress.

Question: How do you perceive regulatory reform as affecting the water quality problem of the people of Thibodaux Parrish, Louisiana? A coastal area with extensive oil exploration, agricultural-related dredging, and salt water intrusion.

Answer: There are a lot of factors that affect the quality of the waters of the United States. The 404 program hits only an infinitesimally small part of the problem. In coastal areas, as you said, you have the additional problem of salt water intrusion. You cannot regulate oceans very well; they are going to do their thing regardless. For example, for a project where a 404 permit is required, if our review indicates that by granting the 404 permit the project will increase salt water intrusion, the Corps should consider this impact in its decision on the permit. But there is a limit on what you can do in correcting salt water intrusion in coastal areas through the 404 program. In my opinion, non-point sources which are not regulated have a much larger impact. But the point here is to keep in mind what the 404 program can and cannot do in respect to protecting the nation's water quality; we are limited.

Question: Have individual State coastal agencies had input into the new regulations?

Answer: We gave very close consideration to the views of coastal management agencies in developing our new regulations. I think we have coordinated with them.

Question: Inaudible.

Answer: LTC Dave Peixotto - Inaudible.

Question: Will you comment on the new 30-day comment period required by the regulations?

Answer: One of the things we hope will come about under our new program is that you won't have to wait to get an official notice before the 30-day comment period starts. We think that with closer coordination between Corps Districts and resource agencies, you won't be hit with new permits without advanced information. Hopefully, some of this advance information can replace some of the lost time in the 404 permit process. On the other hand, we are trying to have a program which, as the Congress made quite clear, should receive Federal action within a 90-day period. Obviously, you can't proceed on the more controversial 404 permit applications without some early dialogue.

Question: What about large controversial projects that would otherwise fall under the nationwide permit?

Answer: We envision that most controversial projects will be withdrawn from the nationwide process and go through the normal permit process if a resource agency has serious problems with the project. Again, we believe this approach will conserve Corps' resources, allowing us to focus our resources on the important projects.

THE FEDERAL GOVERNMENT'S EFFORT TO DISMANTLE THE CLEAN WATER ACT 404 PROGRAM: THE COUNTEROFFENSIVE BEGINS

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The Department of the Army has initiated two broad efforts which have implications for federal efforts to maintain and restore the integrity of the Nation's waters under the Clean Water Act, 33 U.S.C. Section 1251, and other federal statutes.

The first is an important effort to reform the economics and funding of federal water resource projects. The logic of this reform is that these water projects should be subject to a market test and that local funding, private investment and user fee requirements can provide initial screening for the wisdom of a water project far better than conventional Corps of Engineer benefit/cost analyses. This reform has implications for Section 404 of the Clean Water Act because 404 has unfortunately, from a political point of view, been subject to political overload in the evaluation of federal water projects that would never meet a market test and never should have been built purely on economic grounds.

The other initiative in salient measure runs counter to the objective of the Clean Water Act in that the Administration in Washington, D.C. is engaged in a process which is seriously weakening the substantive protection of the Clean Water Act Section 404 program. One can support in many respects the effort to reform the procedural review process of that program. Indeed, if the goal of the procedural reform effort were intended to make decision-making more efficient and speeded up we would expect that many permits would be denied much more expeditiously than they are. Federal agencies waste valuable resources when they spend months on intensive review of certain permit applications when the Corps of Engineers should expeditiously deny them for non-compliance with the 404(b) guidelines, 40 C.F.R. Part 230. Regrettably the reform of 404 procedures underway is proceeding on the assumption that permits should be issued (not denied) more expeditiously simply because the reform effort is aimed at making the 404 program more palatable to some by weakening its substantive protection mechanisms.

1. Wetlands and water quality

Our concern for wetlands in the context of the Clean Water Act stems from the importance of wetlands for the integrity of the quality of the Nation's waters. The objective of the Clean Water Act, as set out in Section 101(a), 33 U.S.C. Section 1251(a), is to restore and maintain the chemical, physical, and the biological integrity of the Nation's waters. The Clean Water Act is not restricted to chemical integrity, but physical and biological integrity, of the Nation's waters as well. It would be impossible to achieve that worthy objective, which Congress established in October 1972, if the Nation's wetlands, which are so vital to the biological and physical, as well as chemical, integrity of the Nation's waters, are not afforded regulatory protection.

Furthermore, wetland protection is a cost-effective preventive approach to protecting, maintaining, and restoring the physical, chemical, and biological integrity of the Nation's waters. The Nation's wetlands, whether coastal or inland, estuarine or freshwater, immediately adjacent to major interstate rivers or isolated, play vital roles in water chemistry, water biology, and the physical well-being of the Nation's waters. These water quality functions include transformation of inorganic into organic nutrients, production of dissolved and particulate organic detrital matter, entrapment of sediments, control of soil erosion, rapid metabolism of biodegradable toxics compounds, moderation of water flows and a large number of other chemical and biological transformation. These wetlands perform these complex water quality roles, so to speak, free of charge. Where wetlands are protected, the Nation does not have to spend tens of billions of dollars on huge advance treatment plants in an effort to compensate for their loss.

2. Scope of federal 404 jurisdiction

Some claim that Congress did not intend through the Clean Water Act to protect our Nation's wetlands. Evidence in support of this assertion is that the word "wetlands" is not used in the body of the Clean Water Act. Yet, this view is not supported by the legislative history, judicial decisions and the Act itself.

Based on use of the term "navigable waters" in the Act, the Corps of Engineers, following the Act's enactment in 1972, initially interpreted its Section 404 jurisdiction to be commensurate with its jurisdiction under the 1899 Rivers and Harbors Act, 33 U.S.C. Section 401. Yet in Section 502(7) of the Clean Water Act, 33 U.S.C. Section 1362(7), Congress stated explicitly that the term "navigable waters", which is the term used in Section 404 of the Act, means all "waters of the United States including the territorial seas." Thus, it should be very clear that Congress intended federal jurisdiction to extend far beyond the traditional "navigable waters of the United States," the scope of federal jurisdiction in the 1899 Rivers and Harbors Act, 33 U.S.C. Section 401. In addition, the Senate Report which led to the 1977 Amendments states:[1]

> There is no question that the systematic destruction of the Nation's wetlands is causing serious permanent ecological damage. The wetlands and bays, estuaries and deltas, are the Nation's most biologically active areas. They represent a principal source of food supply.
>
> The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of Section 404 has attempted to achieve.

It should be evident that the Congress was fully aware that the jurisdiction of the Act extends to the Nation's wetlands.

Clearly the courts have repeatedly said that the Act is intended to cover the Nation's wetlands. Most recently, the U.S. Court of Claims, held in the Deltona v. United States, 657 F. 2d 1184, 1187 (D.C. Cir. 1981), cert. denied, ___ U.S. ___, 102 S. Ct. 1712 (1982), that "a basic policy of the FWPCA (Clean Water Act) is the protection of our Nation's wetlands and the important functions which they serve," quoting Avoyelles Sportsmen's League v. Alexander, 473 F. Supp. 525, 533 (W.D. La. 1979).[2] Although some seem to discount judicial opinion on the grounds that the federal courts are not to be trusted, the U.S. Constitution does recognize the federal judiciary as an independent branch of the U.S. Government.

Although Congress did not use the word "wetlands" in the text of the Clean Water Act, it did state clearly in numerous places in the Act, including in the goal section of the Act, Section 101(a)(2), 33 U.S.C. Section 1215(a)(2), that the Act is intended to assure water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in water. Where does the propagation and protection of much of our fish, shellfish, and wildlife dependent on aquatic organisms for food take place? Where are organic matter and aquatic organisms which feed on that detrital matter and are a source of food for fish, shellfish and aquatic-dependent wildlife produced? These vital activities take place in the wetlands of the United States as well as in many of its shallow estuarine and riverine areas. These are the spawning and nursery areas that Congress clearly had in mind. These aquatic water quality functions, which are also identified expressly in Section 404(c) of the Act, 33 U.S.C. Section 1344(c), are a litmus test that one can hold up to determine what Congress intended to be the scope of federal jurisdiction over the waters of the United States. Major wetland systems are important as fish spawning and nursery areas or as aquatic-dependent wildlife wintering, breeding and feeding habitats because they play a major role in the biological, chemical and physical integrity of the Nation's waters. They therefore function as an integral part of the waters of the United States for purposes of the Clean Water Act.

If we ask these questions about water quality functions, we can develop a concept of the appropriate scope of federal jurisdiction, because, undeniably, in terms of these aquatic functions, wetlands have a clear link to interstate commerce. One example of a wetland system which exhibits these links are the bottomland hardwood wetlands of the lower Mississippi River Valley. In a Section 404 case, sometimes known as the Lake Ophelia case, formally designated Avoyelles Sportsmen's League et al. v. Alexander, et al., 473 F. Supp. 575 (E.D. La. 1979) and 511 F. Supp. 278 (W. D. La. 1981), on appeal No. 79-2653 and 82-3231 (5th Cir.) a federal court in the Western District of

Louisiana held that some 18,000 acres of a 20,000 acre tract of bottomland hardwoods in the backwater area of the Red River in Avoyelles Parish, Louisiana, were wetlands and part of the waters of the United States. The Corps of Engineers had initially held that only some 30% of the tract, primarily the cypress sloughs and immediately contiguous areas, was a wetland. Under court order, EPA, supported by a six-man scientific team, concluded that some 80% of the tract met the wetland criteria of 33 C.F.R. Section 323.2(c) and the EPA 404(b) guidelines, 40 C.F.R. Part 230. The Final Wetland Determination which the federal defendants prepared in that case pursuant to the federal court order adopted the EPA position. Following a two-week trial, at which a large number of expert hydrologists, botanists, soil scientists and ecologists testified, the federal court found that some 90% of the tract was a wetland and part of the waters of the United States.

It would be fair to characterize this decision as controversial. Indeed, the Corps of Engineers has been unwilling to apply the district court's two holdings outside the Western District of Louisiana, although EPA has made some bottomland hardwood wetland determinations elsewhere in the South generally in a manner consistent with the decision of 511 F. Supp. 278 (W.D. La. 1981). Did Congress intend 90% of the Lake Ophelia bottomland hardwood tract to be included as part of the waters of the United States? If we apply our litmus test to assess the reasonableness of this jurisdictional holding, we should consider certain basic ecological facts. The Lake Ophelia tract is part of the 160,000 acre Bayou Natchitoches Basin, part of the Red River backwater or overflow area. During high water periods, typically in the late winter and spring, when Mississippi River and Atchafalaya River stages are high, the Red River cannot discharge into the Atchafalaya. At such times, Red River waters back up into areas like the Bayou Natchitoches Basin. During periods of such back water flooding, many species of riverine fish migrate into these shallow warm overfed areas to spawn. Since they are rich in aquatic foods, they serve as highly productive fish spawning and nursery habitats.

In April 1979, at the time of the first hearing in the Avoyelles Sportsmen's League case, the waters of the Red River backed up into the Basin and inundated the Lake Ophelia tract to elevation 49 or 50 feet and therefore flooded almost 90% of the tract, almost co-terminus with the area that the federal court subsequently found to be a wetland. During that high water period in the Spring of 1979, a biologist from the U.S. Fish and Wildlife Service traversed the tract in a boat and took samples of fish larvae, post-larvae and juveniles on the tract up to elevation 47 to 48 feet. This sampling program estabished in a field test what omnipresent vegetation, soils and hydrologic indicators evident on the tract bear witness to --- that the tract functions as an important and vital fish spawning and nursery area for the Red River fisheries. Further, because aquatic organisms abound on the tract in pools of water resulting from precipitation or flooding, the tract serves as a breeding and wintering habitat for many species of ducks and other species of wildlife dependent on those aquatic organisms for food.

Thus, based on our litmus test which defines waters of the United States in terms of Clean Water Act aquatic and water quality functions which Congress explicitly addressed in Section 101(a)(2) of the Act, the district court's delineation of wetlands based on vegetation, soils and hydrologic factors incorporated in the definitions of the wetland term at 33 C.F.R. Section 323.2(c) is eminently reasonable, and the Corps' initial determination falls far short of the mark. This litmus test is a fair and reasonable measure of the appropriate scope of federal jurisdiction reflected in the Clean Water Act statutory term "waters of the United States."

3. Significance of infrequently inundated or saturated wetlands for Clean Water Act water quality functions

It is claimed by some that, while some wetlands are admittedly important, others are not important. The proverbial example of marginal or unimportant wetlands is cattails in an individual homeowner's back yard. However, there is a world of difference between the statement that Congress did not intend to regulate fill activities by suburban homeowners who want to fill a few square meters of cattails in their back yards and the assertion that Congress did not intend to assert jurisdiction over bottomland hardwood wetlands which function as fish and wildlife propagation and feeding areas, over the prairie pothole wetlands in the North Central States that are so important for wildlife breeding, over pocosin wetlands or over other types of wetland systems which perform significant functions for in the chemical, physical and biological quality of waters integral to aquatic activity which Congress emphasized in the Clean Water Act.

It is also important to point out that scientific research throughout the 1970's and continuing today is steadily demonstrating that wetland systems that are inundated or saturated by rain, flooding or tides on an infrequent or intermittent basis play biologically critical roles in terms of chemical, physical and biological water quality and therefore aquatic functions. One example of an estuarine wetland system with frequently and infrequently inundated components are mangrove swamps. In the early 1970's, prevailing scientific research had unquestionably established that red mangrove communities which are diurnally inundated are important and productive components of the estuarine and bay systems of South Florida.[3] Only in the last two to three years has scientific research unequivocably shown that the black mangrove basin forests, which may be tidally inundated less than 180 times in an annual cycle, primarily during so-called spring tides, are equally as important in terms of chemical and biological water quality as the red mangrove communities and play a complementary role in terms of production of organic matter which enter estuaries in pulses of energy.[4] Through evolution, a number of species of fish and shellfish have timed their entry into South Florida estuaries which function as nurseries to these pulses of organic energy. Likewise, those areas of the bottomland hardwoods that are infrequently inundated or saturated are more important in many respects for fisheries and water quality than the almost permanently inundated cypress sloughs.[5]

4. Activities subject to 404 regulations

Some claim that 404 is not an effective tool for protecting the nation's wetlands because it regulates only discharges of dredge or fill material and, therefore does not regulate major kinds of massive onslaughts on the nation's wetlands such as clearing, excavation and drainage. This position assumes, of course, that mechanized clearing, excavation and drainage processes do not entail discharges of dredged and fill material -- a position which belies logic, common sense and field evidence. The only court in the country which has considered whether clearing of wetlands with mechanized equipment with a view to their conversion to cropland constitutes discharges of dredge and fill material found that Section 404 is intended to regulate this process. Avoyelles Sportsmen's League v. Alexander, 473 F. Supp. 511 (W.D. La. 1979). Further, from a policy perspective, the Congress fully addressed this issue in the 1977 Amendments to the Clean Water Act, specifically in Section 404(f), 33 U.S.C. Section 1344(f).

Although Congress generally exempted from regulation discharges associated with normal agricultural, normal silvicultural and certain minor drainage and maintenance activities, Congress stated very clearly in Section 404(f)(2) that "any discharge of dredged or fill material into navigable waters incidental to any activity having as its purpose bringing any area of navigable waters into a use to which it was not previously subject" where the flow or circulation would be effected shall require a permit under Section 404 (emphasis added). Section 404(f)(2) states emphatically that Section 404 is to regulate any discharge incidental to a conversion activity. That 404(f)(2) is intended to cover so-called de minimis discharges is evident from the fact that it refers back to Section 404(f)(1) which exempts from regulation discharges associated with enumerated activities simply because those discharges typically have no significant impact on the integrity of the Nation's waters.[6]

As a practical matter, bottomland hardwood, pocosin, prairie pothole or other inland wetlands can not be drained or cleared in the absence of _any_ discharge incidental to that conversion. This would be so even if, for argument's sake, the removal and conveyance of wetland vegetation did not _per se_ involve discharge of dredged or fill material, a position which the court in _Avoyelles Sportsmen's League_, 473 F. Supp. 525, rejected. Although the Corps of Engineers takes the position that so-called "_de minimis_" discharges are exempted,[7] it should be evident on its face that Section 404(f)(2) exempts no discharges, no matter how "_de minimis_, where they are _incidental_ to wetland conversions. Since agricultural clearing and drainage projects probably account for 75 to 80% of wetland loss in this country, Section 404(f)(2) should be viewed as an effective tool for regulating such conversions by clearing, drainage or excavation operations while on-going silvicultural, agricultural and minor drainage activities are not regulated.

5. Procedural efficiency of the 404 program

Many efforts to increase the efficiency of the operation of the 404 program are on the whole commendable. Some initiatives in this direction were instituted before 1981. Examples include issuance of joint public notices by some Corps districts and state regulatory agencies and joint processing of permit application by federal and state resource agencies in some Corps districts. Although we have supported these kinds of procedural reforms, the Corps districts in the Lower Mississippi Valley Division have opposed these basic procedural reforms and, by that refusal, have helped to undermine the credibility of the Section 404 program in the South Central states.

An example of a more far-reaching procedural modification is the Wilmington District's January 27, 1981 general permit for activities subject to North Carolina's Coastal Area Management Act permit process. With some qualifications and with some changes, the process described in that general permit might be a step in the right direction. Since so many Corps districts are now proposing state program general permits, general permits which fail to meet the general permit criteria of Section 404(e) of the Act, 333 U.S.C. Section 1344(e), it is instructive to note that what the Wilmington District has denominated as a general permit should more properly be designated a "Memorandum of Understanding" with its emphasis on a process for decision-making between state and federal agencies. The Wilmington District "MOU" provides that, in many circumstances, state agencies will make a permit decision. It also provides that, at any point in the decision-making process, however, the U.S. Fish and Wildlife Service, National Marine Fishery Service and state resource agencies may seek independent federal review.

Even the Wilmington District "MOU", however, suffers from two defects. Insofar as it does not require the Wilmington District to institute independent federal review whenever the Fish and Wildlife Service and National Marine Fisheries Service request it, it runs afoul of the mandates of the Fish and Wildlife Coordination Act, 16 U.S.C. Section 661. Although the Wilmington District may respond favorably to all such requests, other districts may not do likewise. Further, this MOU defines no clear role for the public. Such a federal-state MOU should therefore provide for independent federal review based on a NEPA-type threshold test, including evidence of public controversy, particularly where state law and regulations do not require the state regulatory agency to provide for public input and participation at a level comparable to that incorporated into Section 404 and NEPA processes.

6. Section 404 economic review analysis

Since the Administration speaks so frequently of subjecting federal regulatory programs to vigorous economic review analyses, it may be asked whether the Department of the Army's regulatory changes, in particular those respecting jurisdiction changes, e.g., the general permits for categories of water in 33 C.F.R. Section 330.4(a)(1) and (2), have been subject to any kind of benefit cost analysis. Certainly no such analysis has ever been released.

The only benefit cost analysis that has been performed on the Corps regulatory programs, including the Section 10 and 404 programs, is a study undertaken by the Institute for Water Resources of the Corps of Engineers in Fort Bellvoir, Virginia.[8] That study concluded that the Corps' Section 10 and 404 regulatory programs, as administered before many of the recent regulatory jurisdictional changes, enjoyed considerable net national economic benefits. The costs that were identified in that analysis were primarily costs associated with delays. Since there are many ways in which delays can be reduced and therefore many of the costs of those delays eliminated without concomitantly reducing the benefits of wetland protection, the study points to strategies of maintaining the enormous benefits of the Corps' regulatory programs at reduced administrative cost. Regrettably, the Department of the Army made the decision that this study should not be released in final form. Unfortunately, some in the Department of the Army seem to view protection of wetlands as a cost, not a benefit. However, in the context of the Clean Water Act, increased wetland protection must be viewed as a benefit of the Corps' regulatory programs.

It should be evident that efforts at genuine procedural reform designed to strengthen the efficiency of administration of the Section 404 program can be carried out independently of efforts to weaken the substance of the program. The fact that the Department of the Army is making regulatory changes which do violate the substance of the 404 program is not a necessary corollary of procedural reforms the objective of which is increased efficiency in the decision-making process.

7. Impact of the Section 404 program on the national economy - alternative technologies

Some claim that the Section 404 program hurts the economy. Surely, if one prepared a list of the Fortune 500 causes of the economic malaise in this country the Section 404 program would not be listed. One can think of many better ways of reducing federal waste and therefore helping the economy. One suggestion, of course, would be for the federal government to stop building the Tennessee Tombigbee Waterway.

In the long term the Section 404 program must be viewed as having a technology-forcing function. Residential developers have found that there are ways of building in coastal areas without destroying wetlands by seeking out upland sites in coastal areas where residential clusters or high rises can be designed to accomodate large number of residential units, without destroying wetlands. Indeed, design and siting changes can accomodate all non-water-dependent activities. This means that reasonable private and public non-water dependent economic objectives can be attained without wetland and concomitant water quality degradation.

Other activities cannot be so completely resited. A significant portion of the activities of the oil and gas industry takes place in wetland and estuarine areas of Louisiana, Texas and Alaska. Construction of equipment and pipeline canals and roads all contribute to wetland loss.[9] However, since the oil and gas industry has found ways of exploring for and developing oil and gas in unfavorable climatic conditions, such as the North Sea, where waves reach 20 feet or more and temperatures drop below zero, it is not unreasonable to conclude that the energy companies of this country could develop the technologies to explore and develop for oil and gas in the Louisiana coastal zone and other wetland areas without extensive dredging. Traditional technologies have resulted in a labyrinthian maze of canals. Strict enforcement of the 404 program, phased-in over a period of a few years, would provide the incentives for the energy industry to develop technologies which would minimize wetland loss.

If we look at the 404 program in a technology-forcing light, with the passage of time we should be able to develop technologies and techniques for attaining economic objectives without wetland loss. In addition, wetland protection serves many economic enterprises associated with sport and commercial fishing, shellfishing and hunting, recreation, tourism, groundwater recharge, storm protection and water quality maintenance. Thus, the conclusion of the Institute for Water Resources that the Corps regulatory programs have net national economic benefits is eminently sound. Ipso facto, substantive weakening of the 404 program, including reducing the scope of federal jurisdiction, would be expected to impose net economic costs on the nation.

8. State delegation of the 404 program

Some maintain that the Section 404 program should be spun off to the states as quickly as possible. In the 1977 Amendments Congress did develop a program for state delegation. Section 404(g) of the Act, 33 U.S.C. Section 1344(g), sets out basic criteria and requirements with which a state seeking delegation of the program must comply.

The delegation process is designed to assure that states which take over the program will maintain the jurisdictional scope of the program, regulate appropriate activities and respect the substantive criteria set out in the 404(b) guidelines 40 CFR Part 230. In addition, a state must have the resources to administer and enforce the program. Section 404 also provides under various circumstances for independent federal review even after state delegation.

It may be the case that the present EPA state delegation regulations at 40 C.F.R. Part 123 are unduly cumbersome and could be streamlined so as not to constitute an unnecessary burden in the way of state delegations. If states are to take over the 404 program, however, it should be done through compliance with Section 404(g) procedures, not under the guise of so-called state program general permits which several Corps districts are proposing under Section 404(e). State program general permits are simply an illegal circumvention of state delegation procedures.

9. Administrative steps to reduce the jurisdiction scope of the 404 program

Although some of the efforts at procedural reform are commendable, serious efforts are underway to reduce the jurisdictional scope of the program in ways which are blatantly illegal. The Department of the Army's July 22, 1982 regulations include two general permits for categories of waters at 33 C.F.R. Section 330.4(a)(1) and (2). The first of these two is for all waters, including wetlands, above the 5 cfs headwaters. This is the so-called headwater exemption in the form of a general permit. In contrast to former Corps administrative practice, 33 CFR Section 330.4(a)(1) includes no 10-acre lake exception. The second, 33 CFR Section 330.4(a)(2), covers all non-tidal waters which are not part of a tributary system to interstate or navigable waters.

Together, these two general permits may cover more than half of the Nation's wetlands and "isolated" waters. Undoubtedly, most of the prairie potholes, isolated cypress domes and large expanses of inland wetland systems, such as the bottomland hardwoods, wetland/lake systems and groundwater-fed wetlands, will not be subject to individual permit regulatory protection under these general permits. If we assume that non-regulation of these waters will accelerate their loss, these two general permits will accelerate degradation, not maintenance and restoration, of the chemical, physical and biological integrity of the Nation's waters. They are therefore inconsistent with the objective of the Clean Water Act.

More specifically, the two general permits for categories of waters must be viewed as illegal because they do not cover solely categories of activities similar in nature which have, separately and cumulatively, minimal impacts on the environment -- the basic requirements of a lawfully issued general permit as set out in Section 404(e), 33 U.S. Section 1344(e). Although 33 C.F.R. Section 330.4(b) sets forth six conditions which any activity must satisfy to qualify for these general permits, none of these conditions specify that the waters at issue must be shown not to be wildlife or fish propagation areas. Since many of the inland wetland systems above 5 cfs or separated from interstate rivers tributary systems function as fish or wildlife propagation or feeding areas, these two general permits conflict directly with one of the primary goals of the Clean Water Act. At the same time, many Corps districts have construed the 5 cfs headwater exemption in a manner which leads to withdrawal of effective regulation over activities in large expanses of inland wetland areas.[10]

In addition, some of the substantive nationwide permits at 33 C.F.R. Section 330.5(a) do not satisfy Section 404(e) criteria. Indeed, the Corps has not prepared detailed assessments of many of the Part 330 general permits, the mandates of 40 C.F.R. Section 230.7(a) and (b) and Section 404(e)(1) of the Act notwithstanding. Likewise, Corps districts which have proposed state program general permits to date have not prepared the required assessments. These are just a limited number of examples of on-going Department of the Army dismantling of the Section 404 program.

Several national environmental organizations have indicated that they intend to challenge in court the multifaceted illegal aspects of the July 22, 1982 regulations and other recent Corps actions designed to weaken the Section 404 program. When the executive branch of government violates the law, as citizens, we must seek relief in that third branch of government which the framers of our Constitution nobly set up in 1789, namely the judicial branch.

In summary, if we are to take seriously the objective of the Clean Water Act to maintain and restore the chemical, physical, and biological intetgrity of the Nation's waters, we have no choice but to protect our Nation's wetlands. The Nation's major wetlands systems, including isolated and infrequently inundated systems, are linked to interstate commerce. The Clean Water Act was intended to provide regulatory protection over these wetlands as part of the waters of the United States. Protection of these wetlands is a cost-effective, financially sound approach to water quality management. If properly administered and not gutted, the Section 404 program will provide enormous net economic benefits for the country. On-going proposals to restrict the scope of federal jurisdiction under Section 404 over a significant portion of the Nation's major wetland systems and to limit exercise of regulatory authority over clearing, drainage and excavation operations associated with wetland conversion will have disastrous consequences for the national effort to maintain and restore the chemical, physical and biological quality of the Nation's waters.

FOOTNOTES

1. Sen. Rep. No. 95-370, 95th Cong., 1st Sess. 10, reprinted in 1977, U.S. Code Cong. and Ad. News 4326, 4336. The legislative history confirms that Congress recognized that waters move in hydrological cycles and intended to protect aquatic regimes such as wetlands because of their importance as biologically active areas, sources of food supply, spawning grounds for fish and shellfish and nesting grounds for birds and wildlife and because they provide natural treatment of waterborne and airborne pollutants. See, e.g., 4 Legislative History at 638, 708, 901-947, 1281 (Senate Report and Senate Debates).

2. See, e.g., Leslie Salt Co. v. Froehlke, 578 F. 2d 742, 755 (9th Cir. 1978); United States v. Ashland Oil and Transportation Co., 504 F. 2d 1317, 1324 (6th Cir. 1974). See, also, H. Rep. No. 92-911, 92nd Cong., 2d Sess. 53 (1972), reprinted in 1 Legislative History of the Federal Water Pollution Control Act, Environmental Policy Division, Congressional Research Service 818 (1972)(hereinafter Legislative History); S. Conf. Rep. No. 1236, 92nd Cong., 2d Sess. 144(1972), reprinted in 1 Legislative History at 144. Accord, United States v. Byrd, 609 F. 2d 1204, 1209 (7th Cir. 1979); United States v. Ashland Oil and Transportation Co., 504 F. 2d 1317, 1323-24 (6th Cir. 1974); Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

3. In 1969, Heald and Odum established the crucial importance and linkage of the diurnally inundated "fringing" red mangroves to estuarine systems by identifying the pathways for chemical and biological transformation of red mangrove leaf litter, through digestion by bacteria and other aquatic micro-organisms, into useful food energyfor fish and shellfish. See, E.J. Heald, The Production of Organic Detritus in a South Florida Estuary, Ph.D. dissertation, University of Miami, Coral Gables, Florida (1969); W. E. Odum, Pathway of Energy Flow in a South Florida Estuary, Ph.D. dissertation, University of Miami, Coral Gables, Florida (1969).

4. Lugo, A.E., R. R. Twilley and Patterson-Zucca, The Role of Black Mangrove Forests in the Productivity of Coastal Ecosystems in South Florida, (1981)). Dr. Ariel E. Lugo is presently a research wetland ecologist at the Southern Forest Experiment Station, Institute of Tropical Forestry in Puerto Rico, formerly on the faculty of the University of Florida, Gainesville, Florida. Robert Twilley is now at the University of Maryland and

formerly a graduate student at the University of Florida. In their work, these scientists were able to establish that the number of tidal exchanges in the black mangrove basin forests studied was very low in February of each year, gradually increased and peaked around September with some 30 exchanges (see Figure 2 of The Role of Black Mangrove Forests). They also found (Abstract, p. vi - vii):

> "...the decomposition of black mangrove leaves is much faster than for red mangrove leaves, and the quality of the litter exported from black mangrove forests is also richer in nutrients than that from red mangrove forests. On a unit area basis black mangroves export less organic matter to estuaries than do red mangroves but because black mangrove forests cover a larger area, they actually contribute more organic matter to marine waters."

Furthermore, because of increases in tidal exchanges in the late summer and early fall, these scientists found that the basin mangroves contribute organic detrital matter to the estuaries in vast pulses of food energy in that period -- a time of year which, as evolution would have it, coincides with an explosion of demand by estuarine organisms, including juvenile shellfish, for food. During this period, large numbers of estuarine organisms enter the basin mangroves to take advantage of this natural wetland derived bounty.

Thus, the less frequently inundated inland basin mangrove swamps play a crucial complementary role to the frequently inundated red mangroves in maintaining the fish and shellfish nursery functions of the surrounding open water estuarine areas. Without them, the shrimp fisheries of the Florida Gulf would dissapear. Ecologically, there is now no basis to attempt to protect the diurnally inundated mangroves and not the basin mangroves.

5. C. H. Wharton, "Values and Functions of Bottomland Hardwoods," p. 341-353; C.J. Schmitt and P.V. Winger, "Factors Controlling the Fate of Pesticides in Rural Watersheds of the Lower Mississippi River Alluvial Valley," pp. 354-375; L.H. Frederickson, "Management of Lowland Hardwood Wetlands for Wildlife: Problems and Potential," Transactions of the Forth-Fifth North American Wildlife and Natural Resources Conference, Wildlife Management Institute (1980). See also, C. H. Wharton, V. W. Lambow, J. Newson, P.V. Winger, L.I. Gaddy, R. Mancke, "The Fauna of Bottomland Hardwoods in Southeastern United States," pp. 87-160, Wetlands of Bottomland Hardwood Forests,

J.R. Clark and J. Benforado, Ed. (1981).

Although large portions of the remaining bottomland hardwood wetlands are not subject to annual riverine backwater flooding or are not inundated by rainwater for long periods, they are enormously important fish spawning and nursery and wildlife breeding areas. They also provide major recreational habitat to millions of hunters and fishermen. They produce vast quantities of organic detrital matter for downstream aquatic and estuarine systems. Several renowned scientists have noted regarding the functions of infrequently inundated bottomland hardwood wetlands:

> "Even at elevations flooded infrequently, that is, once every 3-25 years, adaptations of the ecosystems to flooding are clear, and couplings with the adjacent aquatic ecosystem are significant."

See J.G. Gosselink, S.E. Bayley, W.H. Conner, R.E. Turner, "Ecological Factors in the Determination of Riparian Wetland Boundaries," pp. 197-219, *Wetlands of Bottomland Hardwood Forests*, J.R. Clark and J. Benforado, Ed. (1981).

When cleared and converted for agriculture, typically agricultural pesticides move readily by surface runoff from these low-lying wetland areas into downstream aquatic and estuarine areas, and soil erosion rates are high. *See* C.J. Schmitt and P.V. Winger, "Factors Controlling the Fate of Pesticides in Rural Watersheds of the Lower Mississippi River Alluvial Valley," n. 6, *supra*; S.J. Ursic, "Sediment Yields From Small Watersheds Under Various Land Uses and Forest Covers," U.S.D.A. Misc. Publ. 1970. Fed. Interagency Sedimentation Conf. Proceedings, pp. 47-52 (1965).

Although these wetlands in some cases are not frequently inundated for long periods, they perform the very functions described in the goals of the Clean Water Act, in particular Section 101l(a)(2).

6. *See* e.g., 4 Legislative History of the Federal Water Pollution Control Act, Environmental Policy Division, Congressional Research Service 1322 (1977).

7. *See* Department of the Army Regulatory Guidance Letter 82-11, Regulatory Jurisdiction Over Vegetative Operations, dated September 16, 1982.

8. Impact Analysis of the Corps Regulatory Program, A Report

Submitted to the Regulatory Functions Branch, Office of the Chief of Engineers, November 1981 (Draft).

9. *See* e.g., *Report on Special Projects for Coastal Louisiana to the Legislature and the Governor from the Senate Committee on Natural Resources and the House Committee on Natural Resources Meeting Jointly* (Sept. 29, 1981), pp. 4-5; *Special Report on Marsh Deterioration and Land Loss in the Deltaic Plain of Coastal Louisiana*, Sherwood M. Gagliano, Ph.D., Coastal Environments, Inc., prepared for the Louisiana Departments of Natural Resources and Wildlife and Fisheries (Feb. 24, 1981); Robert H. Baumann, Center for Wetland Resources, Louisiana State University, Correspondence to Astrid Lolan, Louisiana State Senate, derived from J.G. Gosselink et al., (1979) *An Ecological Characterization Study of the Chenier Plain Coastal Ecosystem of Louisiana and Texas*. U.S. Fish and Wildlife Service by LSU Center for Wetland Reousrces and data files (Baton Rouge, Louisiana, Sept. 4, 1981). For a dicsussion of the causes of land loss in coastal Louisiana, *see* R. E. Turner, R. Costanza, W. Scaife "Canals and Wetland Erosion Rates in Coastal Louisiana", Center for Wetland Resources, Louisiana State University, presented at the LUMCOM conference on land loss in southern coastal Louisiana (February 1982).

10. *See*, decision of the Wilmington District on application of PruLean Farms Joint Venture allowing blocking of a body of water with flow greater than 5 cfs and rerouting of wetland drainage into a water with flow less than 5 cfs.

QUESTIONS FROM THE AUDIENCE FOLLOWING MR. TRIPP'S PRESENTATION:

Mr. Tripp:

Question: What are your thoughts on joining the Section 404 program and NEPA?

Answer: I believe, to a large degree, they are joined today. The Corps of Engineers is the lead agency for NEPA review under the 404 program and I believe they should continue. Of course, on other projects the sponsoring agency has to obtain 404 permits and also has NEPA responsibility for their projects. In such cases, the agencies are responsible for developing alternatives for their projects. A major shortcoming in this approach is that NEPA has been interpreted as procedural, where Section 404 is substantive, in respect to ensuring the quality of the nation's waters.

Question: Let me paraphrase the question. Coastal Louisiana is experiencing accelerated land loss at a rate of 50 square miles per year or 32,000 acres of wetlands per year. Does the Section 404 program have a role to play in this situation?

Answer: I think Mr. Gianelli is right in that the immediate loss is caused by non-point sources, such as salt water intrusion, introduction of pesticides and nutrients from agricultural lands, etc. But one has to address what are the causes of the water quality changes. I believe the causes are brought about by point source types of activities like the dredging of drainage canals for agricultural and oil exploration. So that, if my view of Section 404 is correct in that it should be used to limit the clearing of bottomland hardwoods, as well as a technology forcing tool that requires the energy industry to develop new practices for oil exploration which will limit dredging access canals for oil exploration, then, yes, I believe the 404 program has a role to play.

WORKSHOPS

NOTE: No exact transcripts of the workshops were made and the following is meant to be reasonable representation of the comments and issues discussed at the workshops. Each workshop was presented four times, twice in the afternoon on October 21, and twice in the morning on October 22.

EIS REVIEW AND PREPARATION

Panel Members: Dr. Gerald J. Miller
Mr. Ted Bisterfeld
Mr. Bradley Nicolajsen

The objective of this workshop was to provide some insight into how EPA, Region IV reviews environmental documents, both substantively and procedurally. Additionally, the panel members sought to solicit how these procedures affected the way the development agencies were carrying out their environmental responsibilities; i.e., alternative's development, formulation of mitigation measures, monitoring techniques, and overall project design.

As a goal, the environmental impact review unit attempts to track all projects from their inception until they are formalized into some type of environmental document. Through our input and interaction with the project manager, especially during the initial formulation stages, we have been able to significantly reduce the environmental difficulties which characterized environmentally difficult projects prior to this cooperation. During the whole scoping process, we provide suggestions/observations ranging from questioning the fundamental worth of the project down to making relatively minor changes on a particular design feature. The duration and comprehensiveness of this dialogue is, in general, a function of how effectively the project manager views its worth. Hence, a degree of finesse is appropriate. EPA makes no attempt to control how or what type of projects the development agencies elect to pursue, but merely to offer insights as to how we perceive those responsibilities can best be achieved with environmental sensitivity. On the basis of selected examples discussed by various attendees and the favorable responses we received from some of the project managers who participated in the workshops, we are, at least, doing some things right.

Administratively, EPA's review mandate is directed by Section 309 of the Clean Air Act. The Environmental Review Section is just one element of the Office of Policy and Management; however, as will be noted, all functional elements of the agency are brought to bear on a particular environmental document as needed. Procedurally, we request that at least five copies of any environmental document be forwarded to us. This seemingly large number is due to the fact that we rely on associate review throughout the agency and we are tasked to perform these reviews within established time frames, viz., 45 days for a Draft EIS and 30 days for all other environmental documents. Since the document may be distributed to as many as five different programs, the multiple copies are essential for immediate distribution to avoid delay. The review unit, per se, is broken down along the functional areas; i.e., water resource activities, primarily Corps of Engineers and Soil Conservation Service (Dr. Gerald Miller); transportation and energy (Mr. Joe McEnerney); and health and human services (Ms. Clara J. DeLay). Upon receipt, the assigned project officer gives a cursory evaluation to the document and makes the aforementioned distribution. If, in the project officer's estimation, the project has controversial elements, he/she may elect to contact the lead agency for further information and/or one of the Federal Activity liaison officers at our Washington Headquarters, i.e., the Office of Federal Activities. The latter individual can begin to establish a dialogue with the lead agency's Washington counterparts if deemed appropriate.

After the comments from the associate reviewers are complete, the review project officer compiles them into a single unified response. This response assesses the document in terms of the facility's environmental consequences and adequacy of the document in terms of how these are discussed. That is, Categories LO, ER, or EU, which signify an evaluation of the environmental impact of the proposed action; and Categories 1, 2, or 3, which signify an evaluation of the adequacy of the document.

- o LO (Lack of Objections) - EPA anticipates no significant/ long-term objections to the proposed action as described in the Draft EIS, or suggests only minor changes in the proposed action.

- o ER (Environmental Reservations) - EPA has some significant reservations concerning the environmental effects of certain aspects of the proposed action. EPA believes that further study of suggested alternatives or pronounced modifications are required.

- o EU (Environmental Unsatisfactory) - EPA believes that the proposed action is unsatisfactory because of its potentially harmful effects on the environment. Furthermore, EPA believes that the potential safeguards which might be utilized may not adequately protect the environment from hazards arising from this action. EPA recommends that alternatives to the action be analyzed further (including the possibility of no action at all).

The numeric rating of:

1 - (Adequate) - The Draft EIS adequately sets forth the environmental impact of the proposed action as well as alternatives reasonably available to the project or action.

2 - (Insufficient Information) - EPA believes that the Draft EIS does not contain sufficient information to assess fully the environmental impact of the proposed action. However, from the information submitted, EPA is able to make a preliminary determination of the impact on the environment. EPA has requested that the originator provide the information that was not included in the Draft EIS.

3 - (Inadequate) - EPA believes that the Draft EIS does not adequately assess the environmental impact of the proposed project or action, or that the statement inadequately analyzes reasonably available alternatives. EPA has requested more information and has asked that substantial revision be made to the Draft EIS.

All Final EIS's resulting from Draft EIS's not rated LO-1 are reviewed to determine whether the statement substantially resolves the problems surfaced by the Draft EIS.

In most instances, substantive changes are made in the final document to reflect our comments. In cases where we had serious concerns and/or found the project to be environmentally unsatisfactory in the draft stage and the final has not made any concessions, we often attempt to work the problems out with the agency prior to proceeding with a 309 referral to CEQ.

There was a great deal of discussion regarding the rather dramatic increase (200% from the base figure) in environmental assessments and subsequent "Findings of No Significant Impact" during the previous 18-month period. At the same time EPA, Region IV received only 2/3 of the number of EIS it usually reviews. A number of conjectures were made about what these numbers actually mean. One participant espoused the notion that NEPA has had a positive impact on how developmental agencies design their projects. Hence, a facility which fostered few/diminished adverse impacts would not need a fullfledged EIS. However, it was also noted that many activities with undiminished environmental impacts have been lost to the EIS process through categorical exclusion mechanisms.

Another attendee argued that this change in the degree of environmental documentation was the result of initiatives directed by the Reagan Administration. Her line of reasoning ran that, regardless of the actual environmental consequences of a particular action, once a decision was made to proceed on same, an EIS was viewed merely as a "pro forma" exercise. As might be expected, this provoked some very pointed discussion.

An immediately related area of interest was surfaced by a participant from state government who questioned the appropriateness of the Department of Energy's election to address the restart of the L-Reactor at the Savannah River Plant (Aiken, S.C.), using an environmental assessment. An individual from DOE acknowledged that the environmental impacts were large, but indicated they were no different from those experienced prior to the reactor's decommissioning in 1968. Since the environmental perturbations are no different in kind and are generally attenuated by the time they reach the plant boundaries, DOE deemed an EA appropriate. Although this idea was elaborated upon in detail, some individuals did not appear to be convinced by this argument.

Review of "old projects", viz., those designed with a minimal of environmental sensitivity, was raised in each workshop. These projects can be very difficult; not in the sense of determining the facility's impact, but difficult in the sense of making any substantive changes in the project's design. This is due to relatively obvious reasons. After a protracted period of time, attitudes/ expectations of both the lead agencies and sponsors reach a point where compromise becomes very difficult. Understanding this does not make the situiation any easier. Because old projects have proved to be such a stumbling block in our relations with other agencies, we have developed a structured tracking program in this region to make our interests known easily and to keep them before the project planner as the design evolves.

ALTERNATIVES

Panel Members: Mr. Robert B. Howard
Ms. Dinah Bear
Mr. Sam Tucker

Mr. Robert B. Howard (not an exact transcript)

Welcome to the WORKSHOP ON ALTERNATIVES. My name is Robert B. Howard. I am the Chief of the NEPA Compliance Section for the Environmental Protection Agency here in the Atlanta Regional Office. With me today is Ms. Dinah Bear, Deputy General Counsel of the Council on Environmental Quality and Mr. Sam Tucker, who is the Director of Environmental Affairs for the Florida Power and Light Company. I am very pleased to have Ms. Bear and Mr. Tucker here to discuss alternatives analyses through the NEPA process.

Last year I participated in a workshop for this same conference on scoping. At that workshop, the subject of alternatives kept coming up. This year when Shep Moore asked me for an idea for a workshop, I thought that the subject of alternatives might be a good one. Little did I know that he would have me chair the workshop.

The requirement to address alternatives comes both directly and indirectly from the National Environmental Policy Act. The Act directs that the Federal Government:

> -utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment; this is an indirect reference.

It goes on to require Federal agencies to:

> -include in ....major Federal actions significantly affecting the quality of the human environment, a detailed statement .... on-
>
> -o the environmental impact of the proposed action,
> -o adverse environmental effects which cannot be avoided...
> -o alternatives to the proposed action

And finally, NEPA requires Federal agencies to:

- study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

The act uses the word "appropriate" and the CEQ regulations use the word "reasonable". There are large differences in the definitions of these words in the scope of alternative analyses among the various Federal agencies.

These differences may be due to:

- large differences in the type of projects addressed, and

- great variation in the Federal involvement; (for example; regulatory, sponsor, loan guarantee, or partial funding actions)

These factors may significantly affect the definition of the words "appropriate" and "reasonable".

CEQ has addressed the issues regarding alternatives in regulations and guidance. Two years ago major revisions to the NEPA regs were made. Some of these revisions were designed to help clarify the concerns regarding alternatives. CEQ is once again considering the issues of NEPA. Alternatives is one of those issues.

Ms Dinah Bear, Deputy General Council for the CEQ has graciously agreed to join us today and to discuss CEQ's existing regulations and guidance and any recent relevant court cases.

Ms. Dinah Bear (not an exact transcript)

The CEQ regulations directly address the subject of alternatives. They require agencies to rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated. They require agencies to:
- devote substantial treatment to each alternative considered in detail, including the proposed action, so that reviewers may evaluate their comparative merits,
- include reasonable alternatives not within the jurisdiction of the lead agency,
- and to include the alternative of no action.

In March of 1981 CEQ issued a guidance document containing 40 questions and answers. The very first questions addressed the issues involving alternatives.

> Q.-What is meant by "range of alternatives"?
>
> A.-It includes all reasonable alternatives which must be rigorously explored and objectively evaluated, as well as those other alternatives which are eliminated from detailed study with a brief discussion of the reasons for eliminating them.
>
> Q.-If an EIS is prepared in connection with an application for a permit or other federal approval, must the EIS rigorously analyze and discuss alternatives that are outside the capability of the applicant or can it be limited to reasonable alternatives that can be carried out by the applicant?
>
> A.-The regulations require the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.
>
> Q.-Must the EIS analyze alternatives outside the jurisdiction or capability of the agency?
>
> A.-An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local of federal law does not necessarely render an alternative unreasonable, although such conflicts must be considered.

Until very recently, courts have not been discussing the alternatives issue in terms of applicant as opposed to agency-initiated proposals. Rather, the courts have been using a "reasonableness test" for determining the scope of alternatives to be considered in an EIS. The D. C. Court of Appeals stated in NRDC v. Morton that, "The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible..." The court also said in that case that the "discussion of environmental effects of alternatives need not be exhaustive". Other courts focusing on this issue have generally applied the "rule of reason" to the particular EIS it was examining and then made a determination as to whether the range and examination of alternatives was indeed reasonable. However, these cases have not provided criteria for what is or is not "reasonable", particularly in regard to the aspect which we're discussing today.

Quite recently, however, the 1st Circuit Court (in anticipation of this workshop I'm sure) issued an opinion which addresses the problem of alternatives in a permitting situation. The case is Roosevelt Campobello International Park Commission v EPA (17 ERC 2023), and to my knowledge, it is the first judicial opinion to examine the alternatives question in the light that we're looking at it today. That case involved EPA's decision to issue an NPDES permit to the Pittston Co., which is constructing an oil refinery and marine terminal in Eastport, Maine. The Plaintiffs argued that 1) EPA had erred by making a less searching analysis of alternatives to the privately sponsored project than it would have if the project was publicly funded; 2) that EPA unreasonably limited its consideration of alternative sites to three locations in Maine; and 3) that EPA's comparison of the sites was inadequate.

In its presentation of the case, EPA stated that the purpose of examining alternatives in reviewing permit applications for privately sponsored projects was indeed different than the purpose of examining alternatives for an agency initiated project. In the case of a permit application, EPA said its purpose was "to determine whether the proposed site is environmentally acceptable". In the case of an EPA project, EPA's purpose would be to locate an optimum site for a new facility. EPA also concluded that these different purposes affect the extent of information on alternatives necessary to make a decision.

The Court agreed with EPA on these issues. It stated that, "EPA's duty under NEPA is to study all alternatives that 'appear reasonable and appropriate for study at the time' of drafting the EIS as well as 'significant alternatives' suggested by other agencies." In this case, the Court said that EPA's decision to limit its study of alternatives was consistent with the rule of reason. Furthermore, the Court stated that to preserve an alternatives question for litigation, a potential plaintiff or intervenor would have to offer tangible evidence, during the comment period, that an alternative site might offer a, "substantial measure of superiority" as a site.

This case certainly offers some guidance as to how the "rule of reason" can be applied to permitting situations. It explicitly approves of the two different approaches to alternatives analysis. Several things should be kept in mind however. One -- EPA did evaluate three alternative sites. The choice of these sites was dictated by Pittston's objectives and considerations. Those alternatives were analysed comparatively in terms of air quality, water quality, present land and sea uses, terrestrial and aquatic flora or fauna, and aesthetics. Two -- This is the first decision of its type and there is no way of predicting whether the other Circuits will adopt the 1st Circuit's reasoning. Three -- Plaintiffs failed in part because they had not pointed to any environmentally superior sites during the commenting period.

I look forward to learning what you think about this issue.

Mr. Robert B. Howard (not an exact transcript)

Thank you Dinah.

One of the major issues regarding alternatives is the scope of and timing for alternatives analyses for regulatory actions. Dinah just discussed a court decision involving regulatory actions.

Mr. Sam Tucker who is the Director of Environmental Affairs for the Florida Power and Light Company has volunteered to describe some of industry's concerns regarding NEPA alternatives analyses.

Mr. Sam Tucker (not an exact transcript)

The first point to be made is that the overall NEPA compliance process has changed over the years. Industries in most cases are now anxious to work with Federal agencies in developing EIS's. This philosophy is particularly true with Florida Power and Light Company. We see that these requirements are basically just good planning and are in the best interests of our company. In most cases we would perform these types of analyses in order to meet our objective of providing electrical power to our customers in an environmentally responsible way for the least cost.

The second point is that it is very important that the regulated industry agree on the alternatives considered in an EIS as actually being "reasonable". No one knows what truly is reasonable as well as the proposing industry. Close cooperation on identifying reasonable alternatives can avoid unnecessary conflicts and misinformation being distributed to the public. Still, it is the Federal agency's responsibility to make the final decisions regarding what is or is not reasonable.

The final point is that it is extremely important for Federal agencies to work with industry very early in the EIS process. Scoping should start while the industry is beginning it's consideration of alternatives. If involvement does not occur early, the process loses its usefullness to industry. Companies need to know the concerns and requirements of agencies and the public.

Mr. Robert B. Howard (not an exact transcript)

Thank You Sam.

Now to the most important part of this workshop, what you think about this subject.

The following issue areas were discussed.

- What factors should the Federal agency use in defining "appropriate" or "reasonable" alternatives?

- What should the timing be for performing and releasing the analysis?

- What do you think about the requirement to identify the environmentally preferable alternative(s)?

- What do you think about the use of "straw men" alternatives?

- What do you think about two or more levels and time frames for analyses, (1) site and no action, and (2) project specific (mitigation, project layout, etc.)?

- What should the relationship be between the Federal action involved and the scope of the alternatives analyses?

- Who should be responsible for identifying appropriate alternatives, the sponsoring entity or always the Federal agency?

- Due to major differences amongst Federal agencies on the types of actions covered, should their be great flexibility in the allowable scope of the alternatives analyses?

- Do you have any comments on developing or evaluating the "no action" alternative? Is it always possible to determine such an alternative?

- Should an agency be required to evaluate alternatives not within their jurisdiction?

- Should a cost benefit analysis be required as part of an EIS?

- Should any other alternatives be considered reasonable when another piece of legislation, regulation or guidance mandates a particular course of action? For example, should any alternatives other than the National Economic Development (NED) alternative be considered for a water resources project since a decision maker, according to the Water Resources Council's Principles and Guidelines, must almost always select this alternative?

Definitive answers could not be given for each of these issue areas. However, the importance of determining "reasonable" for each individual case was emphasized. It was noted that just because an action was not within the jurisdiction of an agency or was not easy or possible to implement due to law or regulation, if that alternative could reasonably meet the objectives of the project and could be argued to reflect environmental benefit, it should be considered.

The idea of having a two staged alternatives analysis received positive and negative comments. It was noted that such an approach could resolve certain issues very early in the NEPA process but would add more paperwork . It was recommended that this approach be allowed as an option.

It was emphasized that agencies do not have to identify the single most environmentally preferable alternative but may identify several such alternatives if there are more than one. The agency should identify the environmental differences and tradeoffs among these alternatives.

It was stated that no cost benefit analysis is required by NEPA, however, if one is performed it should be referenced in the EIS. It was noted that most agency sponsored actions require some such evaluation.

Much additional discussion occurred regarding experiences involving alternatives analyses and these issues. No exact transcript was made of these discussions.

DIRECTION FOR WATER RESOURCES IN THE 1980's

Panel Members: Mr. John Rushing
Dr. Marc Safley
Mr. Chris White
Mr. Randell Jones

I would like to welcome each of you to the workshop on Direction for Water Resources in the 1980's and urge your participation in the ensuing discussions. As noted by the title of the workshop, items other than environmental issues will probably be discussed and, as you may guess, economics will be one of the items. Regardless, any item which affects the direction for water resources in the 1980's will definitely impact environmental issues. Hopefully, we will be able to identify the necessary tradeoffs so that good decisions can be made.

The workshop is organized in a panel-discussion format with representatives from two Federal agencies - the Corps of Engineers and the SCS of the Department of Agriculture - and the agency responsible for water resources planning in the State of Georgia - Environmental Protection Division of DNR - as the panel. Each panel member will present his views on the subject and then the floor will be opened to discussion. I encourage you to take advantage of this opportunity to present your views and ideas concerning the direction for water resources in the 1980's.

DIRECTION FOR WATER RESOURCES IN THE 1980's

Remarks by John W. Rushing, Assistant Chief,
Planning Division, South Atlantic Division,
Corps of Engineers

In his testimony before the Subcommittee on Energy and Water Development on the FY 1983 Civil Works budget on February 17, 1982, Mr. William R. Gianelli, Asst. Secretary of the Army, noted that the Federal public works programs, including the Civil Works program of the Corps of Engineers, are at a crossroads. It is apparent that changes are needed to restore the viability of the programs, particularly during times of budget constraint. Pressure on the Federal budget precludes the Federal Government from being able to finance all -- or even a major portion -- of the water projects which this Nation needs.

To cope with this problem, the Administration has adopted several positions on water resources development policy. My remarks today are going to be on the following principal areas as related to the Corps of Engineers:

- Principles and Guidelines for planning water resources development.
- Cost sharing policies.
- Regulatory program reforms.

Statements made by Mr. Gianelli before the Subcommittee on Water Resources, Committee on Public Works and Transportation, U.S. House of Representatives, on June 8, 1982 were utilized in preparing these remarks.

PRINCIPLES AND GUIDELINES

The new Principles and Guidelines proposed to replace the Principles and Standards were published in the Federal Register on March 22, 1982 with the comment period running through May 21, 1982. An interagency staff team is in the process of making revisions to the Guidelines in response to public comments so that they may be published in final form at an early date. The existing Principles and Standards will be repealed at that time. The Guidelines would apply to studies completed more than 120 days after their issuance. I would like to mention two points in the Guidelines which, on the one hand, simplify the planning process and, on the other, help determine which projects move into construction on a priority basis. First, there would be only one required Federal objective to guide agency planning and that is that water resources projects contribute to national economic development. This objective would be addressed with environmentally sensitive plans, but the need to produce a plan with the primary purpose of enhancing the environment would be eliminated (no more EQ plans per se). Secondly, future postauthorization studies would be done under the Guidelines, regardless of when the initial studies were completed.

The Guidelines, which are a simplification of the Principles and Standards in use over the past ten years or so and the cost sharing and financing changes, which I will discuss later, are key areas where the Administration believes the proposed changes are needed. More flexible planning guidelines and a higher level of non-Federal cost sharing and financing will, in the Administration's views, result in production of more implementable plans on a more reasonable timetable.

FINANCING AND COST SHARING POLICIES

Three categories of changes were considered by the Administration in this area. The first pertains to vendible outputs such as hydropower and water supply. The cost sharing proposed is consistent with existing law, i.e. the user pays 100% of the total costs allocated to that purpose. However, the user is being asked to finance rather than reimburse, over time, the costs allocated to water supply and hydropower. This reduces the funds the Federal Government must appropriate and then borrow with interest in the open money markets.

The second category is flood control. In the past, existing legislation provided for local interests to pay for lands, easements and rights-of-way on local protection projects and the Federal Government to pay for all of the costs allocated to flood control on reservoir projects with widespread benefits. This meant that for flood control local interests paid as much as 50% of project costs or as little as none, depending on the type of project. The Department of the Army proposal calling for 35% non-Federal financing on all Federally constructed projects was designed to achieve comparable cost sharing for flood damage reduction, regardless of how achieved, as well as increase the average percentage paid by non-Federal sponsors.

The third type of project is navigation improvement. The Administration's proposal calls for essentially full recovery of costs assigned to deepening major harbors and for annual O&M. A compromise of 75% upfront and 25% reimbursement over time for major harbors (Baltimore, etc.) was offered. This would be a compromise between the options of 100% Federal financing with 50-year reimbursement and 100% non-Federal financing as contained in the proposed legislation.

Cost sharing for studies done by the Corps of Engineers is also proposed in an effort to concentrate planning resources (manpower and budgetary) on the more important studies which have the best chance of implementation. All new studies pertaining to specific problem areas would be undertaken in two phases. The first phase would be a reconnaissance phase financed 100 percent with Federal funds and normally completed within a year. This phase would be fully funded when it receives its initial appropriation and would establish:

- the definition of the problem and its potential solutions;
- a determination of whether or not the study should proceed further, based on a preliminary appraisal of costs, benefits, and environmental impacts of alternative solutions;
- an estimate of the costs of the second phase feasibility study; and
- identification of local sponsor(s) and indication of its (their) willingness to participate in the feasibility study on a cost sharing basis.

The second phase of study would be cost shared 50/50 with no more than ½ of the non-Federal share to be "effort".

REGULATORY PROGRAM REFORMS

This aspect was addressed earlier in this conference by Mr. Gianelli in his remarks. The impacts of the changes are the subject of a separate workshop which you may wish to attend or already have attended. At this point, I would just like to mention the major items directed by the Presidential Task Force on Regulatory Relief with respect to regulatory efforts under Section 404 of the Clean Water Act and Section 10 of the River and Harbor Act of 1899:

(1) New agreements should be developed with Federal resource agencies to assure that disagreements over permit decisions are resolved through a single review above the District Engineer in less than 120 days;

(2) Internal procedures should be modified so that the Corps' District Engineers are able to make decisions on permit applications within 60 days of their receipt;

(3) Use of general permits be expanded;

(4) States be given more authority and responsibility by issuing general permits on a statewide basis with appropriate safeguards and that EPA revise its regulations to increase incentives and simplify procedures for state assumptions of the Section 404 program; and,

(5) The scope of the Section 404 program be clarified to clearly state the jurisdictional limits and to protect the integrity of the Nation's waters.

The Administration believes the above changes will be healthy steps in the direction of good government and provide the public with a responsive and sensible program which will allow needed development to proceed and still fulfill our environmental responsibilities.

SCS WATER RESOURCES PROGRAM IN THE 1980's

Remarks by Marc Safley, Environmental Specialist,
Soil Conservation Service
Washington, D.C.

Good Afternoon! It is a pleasure to be with you today and talk with you about the Soil Conservation Service's water resource program for the 1980's.

The Soil Conservation Service (SCS) is an agency of the U.S. Department of Agriculture. We are charged with the mission of providing technical and financial assistance to landowners and landusers to help them manage and conserve their soil and water resources. In 1977, SCS began an evaluation of the Nation's soil, water and related resources. This activity was mandated by the Soil and Water Resources Conservation Act of 1977 (RCA). RCA evaluations were carried out to determine what the role of USDA will be in soil and water conservation. USDA analysts placed the Nation's resource concerns in order of need for action. First priority is erosion control (SCS's historical mandate). Upstream flood prevention and water management are coequal second priority concerns. As a result of RCA findings, SCS is beginning to reorient personnel and funds to more adequately address RCA high-priority concerns. This redirection is being done in our water resources activities as well as in our other assistance programs.

Let me draw a distinction at this time between SCS programs (including our water resources programs) and the project activities of most Federal agencies. SCS programs are Federally-assisted. Our assistance is requested by local and/or state entities or groups. Local sponsoring organizations provide part of the cost of our water resource projects.

SCS's water resources programs include all or part of our Small Watershed Program (PL-566), Flood Prevention Program (PL-534), Emergency Watershed Program, River Basin Program, Resource Conservation and Development (RC&D) Program, and Rural Clean Water Program. My remarks this afternoon will be confined to implementation of Level C water resources projects--in SCS, the Small Watershed Program.

Traditionally, the Small Watershed Program has used a combination of structural and land treatment elements to effect desired primary outputs of erosion control and flood prevention. We have begun to plan and implement Land Treatment Projects which use land treatment elements (such as terraces, conservation tillage, debris basins, etc.) to control erosion, maintain soil resource productivity, and control runoff of precipitation. We believe Land Treatment Projects will comprise about 25 percent of our PL-566 resources within the next few years.

As you know, there is an effort underway to reform the way the Federal water program is carried out. The substance of that reform is contained in the proposed replacement for the Water Resource Council's "Principles and Standards." These "Principles and Guidelines" (P&G) were published in draft form in the Federal Register in March of this year It is our understanding that they will be released as final rules sometime later this year. Although John will address them in greater detail later, let me list the four main points in P&G because they will serve to guide SCS's water resources program:

1. The National Economic Development (NED)objective is the sole Federal objective in water resource development;

2. Federal planning, development, and investment will focus on local concerns;

3. The cost of vendible services will be paid by the beneficiary, and

4. Water resource services should be provided to the public by the agency, group, etc., that can do it for the least cost.

Under P&G, SCS will be developing plans which will have as selected alternative the one which maximizes NED. This, of course, will not be a pure NED plan, it will continue to be constrained by national and state environmental quality statutes . . . such as NEPA, the Clean Water Act, archeological statutes, and section 12 of PL-566. For those plans in which an NED plan cannot be formulated but which are needed to achieve erosion control, soil productivity maintenance, or other defined SCS priority concern, SCS will seek an exception from P&G from the Secretary of Agriculture. We shall seek exceptions for only the projects which truly merit them.

SCS is proud of the progress it has made in the quality of its water resource plans over the past 12 years. We see P&G as enabling us to continue to do a better job in that we will be able to better focus our resources on the most needed projects. In the 1980's, SCS is going to be doing a better job of integrating the outputs of our water resource programs. For example, river basin studies will be done with an eye toward implementable resource plans. We believe this is good management and the most efficient way to use our fiscal and technical resources.

There are still questions to be answered with regard to the small details of water resource planning under Principles and Guidelines. These will be addressed once we see how it looks in final form. We foresee some adjustments in how we formulate, cost share, and implement our plans. We shall continue to work with NEPA as part of our planning process, and we believe our planning product will be even better.

If you have questions to ask or point to express please do so. Thank you for your attention.

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THE DIRECTION OF WATER RESOURCES FOR THE 80's

THE PERSPECTIVE IN GEORGIA

Remarks by Chris White, Branch Chief,
Randall Jones, Environmental Engineer,
Environmental Protection Division of Department of Natural Resources

INTRODUCTION

Today, the overall quality of Georgia's environment is good. The vast majority of Georgians enjoy clean air and clean water all throughout the State. Of course, problems do exist, but we believe these are localized problems that can and are being addressed.

Given the theme of this workshop, "Direction of Water Resources for the 80's", there are three points about current activities in Georgia that seems particularly appropriate for discussion: first, what kinds of problems face the citizens of our state; secondly, how are these unique situations being addressed at the State level of government; and thirdly, why has Georgia taken this approach.

PROBLEMS

A preliminary report entitled "Water Use in Georgia, 1980" was prepared in 1981 by the Georgia Environmental Protection Division. This report reveals that water use in Georgia has increased by more than 25% over the last 10 years to a daily, state-wide withdrawal of some 7 billion gallons from our streams and rivers and ground water aquifers. That's about 1300 gallons each day for every man, woman or child in the State. This report further describes how our developed water resources (80% from surface sources, 20% from groundwater) are distributed among give categories of use: public supply (12%); rural use (1%); irrigation (9%); self supplied industry (19%); and thermoelectric (cooling) -- (59%). It further estimates that of this total water use, 15% is consumed and 85% is returned to the system. Unfortunately, this report of water use does not reveal one very important aspect of Georgia's water resources, and that is, what is the total resource available for use and how is it distributed throughout the state. The determination of this information is vitally important to the successful future management of

Georgia's water resources.

Georgia is a headwater state that uses both surface water and ground water resources. Surface runoff departs in 15 different relatively small river basins generally draining the northern part of the state toward the south. And although we share river basins with some of our neighboring states, no rivers flow into Georgia. Accordingly, we control our own destinies without inheriting problems from outside our jurisdiction. Georgia's ground water is plentiful in the southern half of the state which is underlain by the principal artesian acquifer. The northern portion of the state overlying the crystalline rock of the Piedmont region has severely limited groundwater resources.

The combination of these water resource settings illustrates one of the major problems Georgia is facing. The northern region must depend in general on small surface flows as groundwater is not available. The southern portion of the state enjoys both extensive groundwater resources and larger surface flows.

Unfortunately, the demand for water is growing rapidly in the northern part of the state where supplies are limited, and although groundwater is generally plentiful in the southern portion, this resource is being overtaxed along the coast giving rise to some special problems there involving severe cones of depression and salt water intrusion. In southwest Georgia increasing water use by agriculture has become a major factor in the use of the resources. These are the water resource problems which face Georgians today and tomorrow.

ADDRESSING THE PROBLEMS

Georgia is addressing its water resource problems through a government organization unique among states - the Environmental Protection Division (EPD). The EPD is a "one-stop" shop for inquiring industries, local governments, and private citizens who can contact the EPD to determine the status of resources and the requirements to conduct certain activities under state law. The responsibility for the environmental regulation/permitting process in Georgia has been delegated by law to the Environmental Protection Division.

In Georgia, water, air and land protection are all responsibilities of EPD. Programs within EPD include among others: clean air, safe drinking water, water quality and ground water use, surface water allocation, safe dams, solid waste management, hazardous waste management, strip mining and land reclamation, air quality, environmental radiation, oil, gas and deep wells, and the function of the State Geologist. These responsibilities are carried out by several branches of the EPD two of which are the Water Protection Branch, responsible for water quality, and the Water Resources Management Branch (WRMB) responsible for water quantity. It is the WRMB which must address the supply and demand problems discussed earlier and which must answer the question: What is the available water resource and where is it located throughout the State?

To answer this question, EPD through the WRMB is developing a statewide "water budget". Like a financial budget it will describe the available resource and compare it with existing and expected demands. This statewide budget will be composed of individual water budgets prepared for each significant withdrawal and discharge point in each of the 15 river basins.

The water budget is a key to the water management effort that has been supported by the Governor and the Legislature since the program was initiated in 1980. With the water budget available EPD can develop management criteria for protecting the resource while permitting wise use. These criteria will be discussed with the people of the river basin and their views will be reflected in the final basin management strategy. With the publication of this strategy, EPD will be in a sound position to respond quickly to local water planning initiatives and to inquiries from industry. This work will also provide a basis for reaction and contribution to work of federal agencies in Georgia.

The information from the individual basin strategies will be very important to continuing the water allocation permit process which is the cornerstone of Georgia's water management program. Under the water allocation permit process, water users, of both groundwater and surface water, must apply for and receive a permit for withdrawal. Agricultural uses are exempted from permitting requirements although irrigation users will soon be required to report their usage, to help in establishing the water budget. Small users below 100,000 GPD require no permit.

The issued water use permit designates a certain maximum withdrawal rate and provides that every user in meeting his withdrawal requirements may not encroach upon that flow in the stream necessary to maintain acquatic life and receive wastewater discharges. In Georgia, this protected low-level stream flow is the 7Q10 flow. This permitting process works to the advantage of permitted users by protecting their useage against encroachment by other users of surface or ground water. The permit process protects the resource as well.

WHY THIS APPROACH?

The direction for water resources in Georgia in the 1980's will be toward management improvement. The basis for this is set forth as a declaration of policy in the 1977 Surface Water Amendments to the Water Quality Act of 1964."....the water resources of the State shall be utilized prudently to the maximum benefit of the people....(and)....the State shall assume responsibility for....establishment and maintenance of a water quality and water quantity control program adequate for present needs and designed to care for the future needs of the State...."

Under this policy directive, and with supporting legislation dating back to 1964 and including laws from our most recent legislative session, our water resources management program is operating as a flexible system rather than as a rigid plan. It is reactive rather than directive, thereby accommodating changes as they occur. Our management system reacts to various development options, provides information on water availability and use, recognizes restrictions imposed by the limits of the resource, protects permitted users and others and encourages the wise and reasonable use of our water resources.

An important part of our strategy is to cooperate with other governmental agencies who can assist us in serving the citizens of Georgia. Currently, we are being helped in the development of solutions to some of our more severe problems throughout the State.

CLOSING

The focus of this workshop is the Directions of Water Resources for the 80's. We have presented to you today how one State, Georgia, is approaching that question. We have illustrated what supply and demand problems face us now and in the foreseeable future; we have described how Georgia is addressing these problems; and we have presented the philosophy behind the program that we have established. We believe that our approach in Georgia to water management is a sound, positive program encouraging wise and reasonable use of our resources.

IMPACTS OF RECENT 404 REGULATORY CHANGES ON FEDERAL AGENCY REVIEWS

Panel Members: Mr. E.T. Heinen
Mr. John Baumeister
Mr. Frank Yelverton
Mr. Richard J. Hoogland

This workshop was particularly pertinent for the Conference attendees since the morning speakers all addressed issues relating to wetlands and the Federal regulatory process that controls the dredging and/or deposition of dredged or fill material into waters of the United States. All sessions were very well attended.

Representatives of the EPA, U.S. Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service discussed the proposed changes in the Corps' regulations pertaining to wetlands and Federal permit procedures and highlighted areas meriting special notice.

Chief among such concerns were changes in crucial definitions, procedural problems that would result from decreasing the allowable time to review and comment on applications, the new elevation procedures and signature requirements, and the degree of impacts to certain wetlands resulting from the expanded general, or nationwide permits.

Representatives from various State agencies brought to the attention of all that some of the changes directly opposed individual State laws, regulations and/or procedures. Of particular concern was the reduced time for providing State certification for applications. While such concerns were noted by officials from Washington, there was little resolution of the issues at the workshop sessions. All concerns expressed, however, are to be considered during subsequent actions relating to regulatory reform.

Specific concerns from the agencies listed below, and represented today, are reproduced on the following pages:

U.S. Fish & Wildlife Service

National Marine Fisheries Service

U.S. Corps of Engineers

IMPACTS OF SECTION 404 REGULATORY CHANGES ON THE REVIEW OF SECTION 10/404 PERMITS

Remarks by Richard J. Hoogland, Chief, Environmental
Assessment Branch, National Marines Fisheries Service
St. Petersburg, FL

The purpose of NMFS is to conduct research and management aimed at continued wise use of the Nation's living marine resources for economic, recreational and aesthetic benefits of the people of the Nation. To fulfill this purpose, it is necessary that attention be paid to the habitat of these resources since habitat is the foundation of the resource and the keystone of resource renewability.

We strive to reverse the current downward trends in quantity and quality of fish habitats by minimizing, and where possible, eliminating further losses and degradation of these habitats; and restoring and enhancing them where possible, while recognizing other compatible essential uses of fish habitat areas.

The past Section 404 program has, in our view, been an effective mechanism for monitoring protection of essential chemical, physical and biological integrity of the Nation's waters as defined as its purpose in the Vice President's Task Force announcement and as an objective in the Clean Water Act. It has been said that Section 404 was not intended as wetland protector. However, nurturing biological quality of water necessitates maintaining integrity of marsh and swamp wetlands. We are, therefore, concerned over any revision of these proven mechanisms that may weaken and ultimately adversely impact living marine resources and the habitat that sustains them. Estuarine wetlands are extremely valuable i.e., 90% of commercial and 70% of recreational harvests are estuarine dependent.

We agree that improving efficiency and eliminating unnecessary delay in processing permit applications are desirable, especially where there is evidence that it is deficient and justified. However, hasty action taken to improve efficiency by shortening processing time on all actions and fixed time limits in overall processing time, thereby reducing opportunities for referral of unresolved differences, gives appearance of being arbitrary and overlooking the importance of aquatic resources. We referred about 27 permit applications since the original MOA and lost 27 . Notwithstanding the fact that the current permit review system can and should be streamlined, a short term simplistic, and arbitrary system favors a development-dominated economic approach and usually precludes an objective overall public interest analysis, particularly on significant or controversial projects (only 25% of caseload fit in this category).

Specific problem areas in regulation changes

1. Nationwide permits - Most activities being exempted will have little or no impact on living marine resources. However, some activities will have potential to impact wetlands supporting living marine resources, e.g., work in artificial canals; deposition of 10 cubic yards or less of fill material into waters of the United States; and bank stabilization; and fills associated with bridges and causeways, therefore, should be topics of regional general permits under the District Engineers.

2. Deferral to Department of Interior on activities affecting OCS - The Minerals Management Service does not feel bound by FWCA and does not consider it necessary to consult with Federal and State marine fishery agencies before issuing OCS drilling or production permits.

3. Concerned with vagueness and lack of detail given to Districts and varying interpretations

a. Consideration of cumulative impacts - There are no consistant means or guidelines provided for the Corps Districts to use during their public interest review. Some districts don't consider cumulative impact assessments or they use different criteria to determine them.

b. Methodology for evaluating importance of wetlands - Experiencing discrepancies between Corps Districts. Their guidance is vague and subject to varying interpretations.

c. Irrigation exemption - Gives no size limitations, i.e., width and depth, has allowed cases where irrigation constructed under the exemption were actually boating access canals and should have permits.

d. Currently serviceable structures exemption - (dikes, dams, levees, groins) does not provide a distinct definition or guidance to Corps Districts, interpretations vary between Districts as to what qualifies as currently serviceable and reasonable period of time.

4. Program transfers to states - Presently proposed, Jacksonville and New Orleans Districts "General Permits" are lacking in the following important points:

a. Are not requiring the States to meet the requirements of the Fish and Wildlife Coordination Act, i.e., not requiring that great weight be given to Federal fish and wildlife agencies' views;

b. Not requiring the States to consider cumulative and indirect impacts to the entire resource, i.e., shrimp resources across entire Gulf of Mexico;

c. Not recognizing the states' inability to consider national interests or interests of neighboring states;

d. Not recognizing the inconsistant ability and interest in wetland protection between states; and

e. Not requiring mitigation of losses

The North Carolina general permit through the Wilmington District meets with our approval.

5. District Engineers' authority - can unilaterally modify or delete conditions in issued permits even if the conditions were recommended by Federal review agencies and making the project acceptable with the conditions as a prerequisite for permit issuance. Often the acceptability of a project to us is dependent on modifications or special conditions to the permit.

6. Enforcement of illegal activities

o Initial investigation - Some districts are interpreting new regulations, guidance to solicit our views as unnecessary or at most discretionary. This undermines our opportunity to comment on probable impacts to living marine resources. Not all districts are dedicated habitat protectors.

o After-the-fact permits - Some Districts interpret Corps regulations to issue A-T-F permits for all violations. This is no deterrent to potential violators and appears to encourage some people to violate the law rather than proceed with before-the-fact process.

CHANGES IN SECTION 404 OF THE CLEAN WATER ACT

Remarks by Frank Yelverton, Special Project Manager
Wilmington District, Corps of Engineers

Major changes in section 404 of the Clean Water Act revolve around reduction in permit processing time. This involves time limits in processing of routine and major permit applications and issuance of new nationwide permits. These time reductions are reflected in our permit regulations published in the Federal Register on 22 July 1982 and in the new Memorandum of Agreement signed in early July 1982 between the Army and EPA, Department of the Interior, and Department of Commerce.

Here are several significant changes in our regulations. They are as follows:

First, a public notice must be issued within 15 days of receipt of a completed application and most permit decisions on routine applications must be made within 60 days of the receipt of a completed application. Also, action on a 401 certificate is generally required within 60 days.

The second change is the expansion of the nationwide permit program, i.e., actions that are permitted without need of processing individual permits. Along with additional nationwide permits, Division Engineers have now been given authority, on their own initiative or upon recommendation by a district engineer, to add regional conditions to nationwide permits or require individual permits on a case by case basis.

Third, general permits are recommended for State programs which duplicate the Federal program. We have issued such a general permit in the Wilmington District for the coastal counties of North Carolina. Approximately 80% of our permits are handled under this general permit with the majority of the processing done by State agencies. This does not alleviate 80% of the workload, however, since most projects involve pre-application meetings and other coordination.

Other changes in our regulations include items such as:

(1) Minor violations no longer need to be coordinated with Federal and State agencies.

(2) A section has been added to our regulation (323.4), to clarify and define what activities are exempt from Section 404.

Regarding changes to the MOA.

Under the former MOA, there was a four step process elevating the project to a high decision level that an agency could take if it objected to the district engineers decision on a project. These steps included the Division Engineer, Chief of Engineers, Assistant Secretary of the Army for Civil Works (ASA/CW) and finally the Secretary of the Army. This process could take 12 months or more. Under the new MOA, there is a one step level of elevation to the ASA/CW. The ASA/CW will decide whether or not the District Engineer's decision will be reviewed by a higher level and if so the ASA/CW will decide the level for review i.e., the Division Engineer, Chief of Engineers, or himself. This new process should take 3 months or less.

This briefly summarizes the major changes as we see them in 404. It is important to note that all these changes essentially involve a time savings. These changes should give most applicants a quicker decision on their permit application and enable the Corps to expend additional effort on the more significant and complex projects. However, we are not reducing the environmental or other factors which a district engineer must consider when making a public interest decision on a permit application, but close coordination will be required among the agencies to meet these time guidelines and still fulfill the public interest review.

IMPACTS OF 404 REGULATORY CHANGES ON THE FISH AND WILDLIFE SERVICES' REVIEW OF SECTION 10/404 PERMITS

Remarks by John Baumeister, Chief, Ecological Services
Fish and Wildlife Service
Atlanta, GA

The FWS has several legislative mandates for protecting fish and wildlife resources including the Migratory Bird Conservation Act, Anadromous Fish Act, Endangered Species Act, and Fish and Wildlife Coordination Act. The Division of Ecological Services (ES) is responsible for commenting on Corps of Engineer permits, and in the southeast, eleven ES field stations are responsible for this activity. To date, the FWS has had a poor track record in overturning decisions by Corps Districts to issue permits for timber clearing and drainage operations for agricultural purposes. This work has primarily been centered in the lower Mississippi River Valley.

The FWS endorses the basic concepts and goals associated with efforts to expedite processing of Corps of Engineer permits. However, considerable confusion and frustration have been experienced in dealing with rapid changes in policy and procedures that have coincided with implementing the new permit MOA. Specific problems include the difficulties interpreting policies contained in the Corps Regulatory Guidance Letters and the lack of opportunities for agencies to resolve issues after the Notice of Intent to Issue is signed by District Engineers. The emphasis which has been placed on issuing General permits to States has also created problems, some of which could have been alleviated by informal coordination by the Corps District prior to issuance of a public notice for the General permit. FWS has expressed concerns relative to the ability of State permitting agencies to adequately protect fish and wildlife resources because of jurisdictional limitations. Of special concern are questions relating to transfering Federal responsibilities for endangered species. The FWS advocates the adoption of procedures currently used by the Wilmington and Norfolk Corps Districts for processing General permits.

Until such time as firm criteria are developed by the Washington Office regarding permit issues that can be elevated, the FWS will continue to recommend referral on any permitted activity that would have significant adverse effects on fish and wildlife population and their habitat.

SYNOPSIS OF REVISIONS TO THE SECTION 404 REGULATIONS AND GUIDELINES

On July 22, 1982, the Army Corps of Engineers published interim final regulations for their regulatory programs under the River and Harbor Act and Section 404 of the Clean Water Act. Revisions to the interim final regulations were proposed in November 1982. Changes to these regulations were prompted by the Presidential Task Force on Regulatory Relief and included: a re-definition and clarification of the scope of jurisdiction; increased emphasis on the use of general permits for categories of similar discharge activities; expansion of nationwide permits for discharges in certain waters; and emphasis on the avoidance of duplicated efforts among Federal and State agencies.

In a similar vein, changes to the Section 404(b) Guidelines have been proposed by the Enviornmental Protection Agency, the agency responsible for formulating the Guidelines in conjunction with the Army Corps of Engineers. The proposed Guidelines have been essentially re-written and include significant changes such as: a new general definition of wetlands based on vegetation, soil, and hydrological characteristics; specific delineations of jurisdictional floodplain and arctic wetlands; a categorization of all jurisdictional waters based on their relative importance in the aquatic environment; and descriptions of various levels of review to be applied when evaluating the impacts of discharges into the various categories of waters.

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